95-1079

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

GEORGE MEYER,

Petitioner,

v.

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, VALLEY SANITATION COMPANY, INC., LAND RECLAMATION COMPANY, and WASTE MANAGEMENT OF WISCONSIN, INC.,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether a non-economic, evenhanded state regulation is subject to, and prohibited by, an irrebuttable presumption of unconstitutionality under the Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3, solely because it may have an impact on out-of-state commerce.

2. Whether the "effective recycling program" provision of the Wisconsin Recycling Law discriminates against interstate commerce in practical effect, in violation of the Commerce Clause.

3. Whether the "effective recycling program" provision of the Wisconsin Recycling Law imposes a burden on interstate commerce that is clearly excessive in relation to the putative local benefits, in violation of the Commerce Clause.

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PETITION FOR WRIT OF CERTIORARI

Defendant George Meyer respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Seventh Circuit Court of Appeals which reversed a district court judgment in his favor.

OPINIONS BELOW

The opinion of the court of appeals is reported at 63 F.3d 653 (7th Cir. 1995), *rehearing and rehearing en banc denied.* It is reprinted at App. 1-23. The order denying rehearing is reprinted at App. 24-25. The memorandum and order of the district court on summary judgment is reprinted at App. 26-40, and the memorandum and order of the district court upholding the effective recycling program provision after trial is reprinted at App. 41-48.

JURISDICTION

The decision was issued August 23, 1995. A timely petition for rehearing was filed September 6, 1995. Rehearing was denied September 20, 1995. App. 24-25. This Petition is timely filed. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the Constitution, Article I, Section 8, Clause 3, provides: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

The provisions of Wis. Stat. §§ 159.07, 159.09 and 159.11 are reprinted in the Appendix at App. 51-62.

STATEMENT OF THE CASE

The Challenged Statute: The Wisconsin Recycling Law bans certain recyclable materials from Wisconsin landfills and incinerators. The purpose of the law is to conserve landfill space by minimizing the amount of recyclable materials in the waste that is disposed of in

state landfills. The law makes several exceptions to the bans, including the "effective recycling program" provision. That exception provides that the ban on waste that contains the listed recyclable materials does not apply to waste from a community that has an effective recycling program, no matter where the community is located. The effective recycling program provision requires that a community design a program to implement and enforce mandatory separation of eleven materials by all residential and commercial entities.

The district court had jurisdiction over plaintiff's challenge to this provision pursuant to 28 U.S.C. § 1331.

The Evidence at Trial: The Wisconsin Recycling Law was designed to keep recyclable materials out of Wisconsin landfills by keeping recyclable materials out of the waste disposed of in Wisconsin landfills, including waste from in- and out-of-state. Approximately 25 percent of the out-of-state waste that is disposed of in Wisconsin landfills is non-municipal waste that does not contain the banned recyclable materials and is therefore unaffected by the law. The plaintiffs who own landfills in Wisconsin and haul waste from in and outside Wisconsin, could not certify that any of the remaining 75 percent would not contain any of the banned recyclable materials.

Of the out-of-state communities that use plaintiffs' Wisconsin landfills, about 20 send waste both to Wisconsin and their own states. In order for most of these communities to comply with the Wisconsin law, they need to pass an ordinance or modify an existing ordinance, add some materials to be recycled, and modify their educational materials. Adoption of an effective recycling program would save money for these communities, generators of waste in the communities, and plaintiff haulers. For most of these communities, the only burden they identified as precluding adoption of an effective recycling program was the burden resulting from

the siting and rulemaking requirements, which were invalidated by the district court.

The evidence at trial established that no other alternative will remove as many recyclable materials from the waste stream, that the minimization of recyclable materials in the waste stream will not be achieved without a mandatory, community-wide and community-enforced, commercial and residential recycling program that comprises an effective recycling program, and that such a program has at most a trivial, and not economically adverse, impact on out-of-state commerce.

The Decisions Below: The district court in its first decision ruled that the effective recycling provision is an evenhanded regulation subject to the *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) balancing test. App. at 30-36. The court held a trial to produce evidence as to the nature and extent of the burdens imposed and the benefits served by the provision, and the efficacy of alternatives. App. at 36-37.

After trial, the court found that the evidence showed that the effective recycling provision imposes at most a minimal, administrative burden on out-of-state communities, with little or no additional cost to the communities or the generators within those communities, and substantial benefits accruing as a result of the provision. App. at 43-46. The court also found no evidence to show that a substantial amount of interstate commerce will be impacted in any way by the provision. App. at 43-46. Finally, the court found that the evidence showed that the effective recycling program "is likely to result in the removal of the greatest amount of recyclable materials from the waste stream." App. at 46. The court concluded that the balance weighed in favor of Wisconsin and upheld the provision. App. at 47.

Ignoring these findings and speculating as to the impact of the effective recycling provision, the court of appeals reversed, ruling that what is tantamount to an irrebuttable presumption of unconstitutionality should have been applied solely because the provision regulates the conduct of generators outside Wisconsin, without finding that any economic disadvantage results from that regulation. App. at 11-29. The court of appeals also ruled that the provision's out-of-state reach also invalidated it under the strict scrutiny and balancing tests. App. at 19-23.

REASONS FOR GRANTING THE PETITION

I. THE DECISION CREATES, AND SUBJECTS STATE REGULATION TO, A NEW COMMERCE CLAUSE TEST NEVER BEFORE ARTICULATED BY THIS COURT.

The effective recycling provision of Wisconsin's Recycling Law is designed to reach all waste destined for Wisconsin, regardless of its origin, and the decision of the court of appeals properly found that it does. The decision improperly isolates the nature of the law's out-of-state reach to create a new independent Commerce Clause test never articulated before by this court.[1]

The evidence at trial showed that the effective recycling program provision's aim at waste destined for

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[1]Furthermore, as shown below, the decision compounds its radical departure from this court's directives by basing the new test on a state law's out-of-state impact even if that impact is not economic and without any evidence of economic harm, thereby taking the "commerce" out of the Commerce Clause prohibition against protectionist state regulation.

Wisconsin indirectly affects waste that does not enter Wisconsin, and that that effect is minimal and economically neutral. It is that incidental impact on non-Wisconsin generators that do not use Wisconsin landfills that prompts the creation in the decision of a draconian third Commerce Clause analysis independent of the traditional two-tiered test set forth repeatedly by this court. *See, e.g., C&A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677, 1682 (1994); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623-24 (1978). This new analysis is extrapolated from the cases that deal with reciprocity requirements and price affirmation statutes, even though these cases are merely subsets of the set of cases concerning regulations whose purpose is economic protectionism and to which heightened scrutiny applies. The decision's carving out of dicta about regulation of commerce in other states independent of any concern with economic discrimination violates the case law of this court.

The decision's new test based solely on the out-of-state reach of a law is directly to this court's decision in *Minnesota v. Clover Leaf Creamery*, 449 U.S. 456 (1981). *Minnesota v. Clover Leaf* shows that a state statute's control of out-of-state commerce cannot practically, alone, be the distinction, because such a distinction would clear the field of any state regulation at all. A ban on the sale of milk in plastic containers was upheld in *Minnesota v. Clover Leaf Creamery*, 449 U.S. at 456, even though that ban controlled the out-of-state use of plastic to bottle milk (burdening not only sales in Minnesota but all sales to the extent multi-state dealers were required to set up new or separate production lines).[2]

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[2]No law was needed to enforce the ban, because it is clear whether milk is or is not in plastic. Here, the mandatory ordinance is necessary to minimize recyclable materials in

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The decision's isolation of a new category of invalid non-economic regulations is also contrary to the decision in *Healy v. Beer Institute*, 491 U.S. 324, 336 (1989), and its fellow price affirmation statutes. Unlike the statute struck down in *Healy*, the Wisconsin effective recycling program applies equally to interstate and in-state waste generators. Equal treatment was not the goal in *Healy*; the goal was to shield in-state merchants and consumers from the competitive advantage enjoyed by business and consumers in other states. 491 U.S. at 340. Also, unlike the statute in *Healy*, the effect on the proportionately small amounts of municipal out-of-state waste destined for Wisconsin landfills is not sufficiently "significant" to trigger a *Healy*-type analysis. Whereas the Connecticut law wholly supplants the out-of-state market for beer, *Healy*, 491 U.S. at 339, the effective recycling program at the most takes away one option for waste disposal from some communities and the generators in them, or requires residential and commercial recycling.

The record establishes as undisputed that the whole point of the nondiscriminatory Wisconsin scheme is that waste from communities without effective recycling programs is different from waste from communities with such mandatory, comprehensive programs because it will on average contain larger proportions of recyclable materials. It is because of this difference in the nature of the waste that the reciprocity cases cited in the decision, *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269

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[2](...continued)
waste, because such objective verification is not available. Moreover, because the record shows that the production line (generation of waste) cannot be split (some recycle and some don't) and the quality of the waste maintained, the resulting inferior product requires that this court's decision in *Maine v. Taylor*, 477 U.S. 131 (1986), be followed. *See* footnote 3 below.

(1988), and *Great Atlantic Pacific & Tea Co., Inc. v. Cottrell*, 424 U.S. 366 (1976), do not apply.[3]

In each of the reciprocity cases the standard set by the importing state is a subterfuge for protecting in-state producers or consumers, and is directed at the origin of the products without regard to their nature. Regulating based on whether waste is from a community with an effective recycling program is a legitimate nondiscriminatory proxy for regulating based on what is in that waste in terms of proportion of recyclable materials. The key is how effectively the waste generator diverts recyclable materials from waste, and the record shows that generators in communities without an effective recycling program are likely to divert a smaller proportion of recyclable materials than in communities with an effective recycling program. The record establishes as undisputed that waste from communities with effective recycling programs will on average and as a whole contain lower proportions of recyclable materials than waste from communities without effective recycling programs.[4]

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[3]It is also because of this substantive difference that the analysis in *Maine v. Taylor* does apply. In that case, the record established that out-of-state baitfish had a parasite that the Maine fish did not, 477 U.S. at 141, and Maine proved that only a complete ban would keep its fish untainted. This court's affirmation of Maine's law resulted from this court's review of the record showing that out-of-state baitfish were in fact different from Maine fish. Here, the record similarly establishes conclusively that there is a substantive difference between a ton of waste from a community with, and a ton of waste from a community without, an effective recycling program, and that there is no better way to protect Wisconsin from the latter.

[4]The decision's disregard for these and other facts in the record, and its substitution of its speculation for those facts, are

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Conversely, in *Hardage v. Atkins*, which the decision analogizes as most similar to this case, Oklahoma did not care what was in the hazardous waste entering its facilities; it was concerned only about what state the waste came from. *Hardage v. Atkins*, 582 F.2d 1264, 1266 (10th Cir. 1978) and 619 F.2d 871, 873 (10th Cir. 1980) (waste subject to higher or different standards prohibited even if safe). In addition, if there were objective standards that Oklahoma could apply in *Hardage*, there is no reason why Oklahoma could not have simply imposed those standards on all waste disposed in-state. Here, by contrast, the record establishes that no such standards are yet available.

All of these essential distinctions notwithstanding, because Wisconsin's law will in some communities affect generators of waste that never enters Wisconsin, the decision seizes dicta about regulating commerce in other states, from cases concerning purely protectionist state laws, to create a new, third prong of the Commerce Clause test. The decision uses that new test to invalidate the Wisconsin law even though the impact on non-Wisconsin waste is minimal, even though the decision finds no demonstrated economic harm on the out-of-state waste generators that may be subject to that impact, and even though the law is not driven by any economic intent or invalid motive. The decision prohibits Wisconsin from treating waste evenhandedly, even though this court has directed that states do just that in order to avoid the dormant Commerce Clause barriers. In short, the

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[4](...continued)
also contrary to this court's directives. *See City of Philadelphia v. New Jersey*, 437 U.S. at 623; *Brown-Forman Distillers v. N.Y. State*, 476 U.S. 573, 579 (1986); *Maine v. Taylor*, 477 U.S. at 145-46; *Pike v. Church*, 397 U.S. at 142; *Kassel v. Consolidated Freightways Corp., Etc.*, 450 U.S. 662 (1981) and its predecessor cases concerning regulation of trucks and trains.

decision creates a new Commerce Clause test never articulated by this court. This petition should be granted to enable this court to undo this radical revision of Commerce Clause jurisprudence.

II. APPLICATION OF THE NEW COMMERCE CLAUSE TEST BY THE CIRCUIT COURT FOR STATUTES THAT DO NOT DISCRIMINATE SENDS CONFLICTING MESSAGES AND REQUIRES CLARIFICATION BY THIS COURT.

By creating an irrebuttable presumption contrary to traditional Commerce Clause analysis at a time when this court has begun to rein in the scope of the Commerce Clause, the appeals court decision throws into great doubt what the law actually is. Prior to this decision, Commerce Clause cases were subject to one of two standards of review. A particular balancing test is associated with each of these standards, dividing burdens of proof between the plaintiff and state according to whether the situation warrants heightened or lesser scrutiny.

This decision creates and applies a third standard, extrapolated from cases involving statutes that blatantly effect some form of economic protectionism. Those statutes offend profoundly the underlying purpose of the Commerce Clause--to strike a balance between maintaining an economic union and preserving state autonomy--and are not at all like the evenhanded, non-economic effective recycling provision. Only where there is no purpose unrelated to economic protectionism, will a state regulation be struck down. *See Brown-Forman Distillers v. N.Y. State Liquor Authority*, 476 U.S. 573, 578-79 (1986).

It is the underlying intent to favor in-state interests that doomed those statutes, known as extraterritorial and reciprocity laws, and that distinguishes those laws from Wisconsin's effective recycling program. Lofty language about extraterritorial reach notwithstanding, where the court invalidated the means, the court detected invalid ends. *See, e.g., Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009, 2016 (1992); *National Collegiate Athletic Ass'n v. Miller*, 10 F.3d 633, 638 (9th Cir. 1993); *Healy v. Beer Institute*, 491 U.S. at 326 (statute discriminates on its face against interstate commerce and was passed to keep Connecticut residents from crossing state lines to purchase beer at lower prices); *Brown-Forman Distillers v. N.Y. State*, 476 U.S. at 580.

In the reciprocity cases, the regulations are knocked down because they seek to keep out products solely because those products are from other states, either to gain economic advantage for their own products in those other states or to lower the burdens on in-state interests at great cost to the out-of-state goods. *Great Atlantic & Pacific Tea Co., Inc. v. Cottrell*, 424 U.S. at 375, 380-81 (requirement that milk from another state may be sold in Mississippi if the other state accepts milk from Mississippi on a reciprocal basis acts to ban good milk from Mississippi and to gain access to other state markets for Mississippi milk); *New Energy Co. of Indiana v. Limbach*, 486 U.S. at 279-80 (regulation that awards sales tax credit for ethanol if produced in Ohio or in a state that grants a similar tax advantage to ethanol produced in Ohio constitutes plain discrimination against out-of-state products to gain favorable tax treatment for Ohio-produced ethanol); *Nat. Solid Wastes Manag. v. Alabama Dept. of Envir.*, 910 F.2d 713, 720 (11th Cir. 1990) (Alabama statute that prohibits hazardous waste from other states that bar hazardous waste themselves discriminates on its face against hazardous waste based solely on its origin). The bottom line for these cases is

identical to that for the traditional Commerce Clause analysis articulated above: the only legitimate basis for a discriminatory regulation is the nature of the product itself.

In the price affirmation cases, the regulations are invalidated because they discriminate on their face in order to give local merchants and consumers an economic advantage and control *prices* in other states. *Brown-Forman Distillers*, 476 U.S. at 580 (sellers of liquor to wholesalers in New York must sell at price no higher than lowest price charged wholesalers elsewhere in the country); *Healy v. Beer Institute*, 491 U.S. at 337, 340 (out-of-state shippers of beer to Connecticut wholesalers must sell at price no higher than prices in bordering states); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935) (out-of-state milk cannot be sold at less than minimum price for in-state milk; plaintiffs' assertion that this is not a case about setting prices is false).

The effective recycling program provision is not like any of these regulations: it is not facially discriminatory, it is not motivated by and does not effectuate economic protectionism, it does not seek economic advantage for in-state interests or set up barriers to out-of-state trade, and it does not extend Wisconsin's enforcement arm into other states (enforcement takes place when waste enters a landfill or incinerator), *see*, *Motor Vehicle Manufacturers Association of United States, Inc. v. Abrams*, 720 F. Supp. 284, 288 (S.D.N.Y. 1989) (notice provision of New York lemon law cannot be enforced in other states). Nor is it at all like the Nevada statute in *National Collegiate Athletic Ass'n. v. Miller*, 10 F.3d at 633, which required the NCAA to give Nevada colleges and athletes greater procedural protection than provided in NCAA rules, thereby forcing Nevada's requirements on NCAA's dealings in all other states. That statute was directed only at interstate commerce, 10 F.3d at 638, at no cost to Nevada and great cost to the NCAA. The effective

recycling program component of Wisconsin's recycling law affects commerce both intrastate and interstate, and burdens both in-state and out-of-state interests equally.

The decision takes the dicta in these cases about affecting policies in other states or regulating commerce in other states too far--any evenhanded regulation, such as the limit on tonnage of waste suggested in *City of Philadelphia v. New Jersey*, 437 U.S. at 617, or the ban on recyclable and other materials in the Wisconsin law, do both. "Practical considerations, however screened by doctrine," must control a commerce clause analysis. *Great Atlantic & Pacific Tea Company, Inc.*, 424 U.S. 372 n.6 (citation omitted). If the object of the effective recycling program had been to keep out all out-of-state waste from Wisconsin, it will not happen. *Government Suppliers Consolidating Serv., Inc. v. Bayh*, 975 F.2d 1267, 1278 (7th Cir. 1992), citing *Brimmer v. Rebman*, 138 U.S. 78 (1891).

The decision's application of the analysis in the extraterritoriality and reciprocity cases independently to the effective recycling program provision sends a confusing message to other circuit and district courts as to the proper test to be applied to non-economic evenhanded regulations, and to regulations totally devoid of any purpose related to economic protectionism. This court must grant this petition to clarify what the test for a statute that does not discriminate should be.

III. THE DECISION BROADENS THE BOUNDARIES OF WHAT CONDUCT IS ENCOMPASSED BY THE COMMERCE CLAUSE, IN VIOLATION OF THE LOCAL-NATIONAL DISTINCTIONS DRAWN BY THIS COURT IN *U.S. V. LOPEZ*, THEREBY CHILLING STATE REGULATION.

As Justice Rehnquist cautions in *U.S. v. Lopez*, 1151 S. Ct. 1624 (1995), the appeals court has used the Commerce Clause to go beyond activity that "substantially affects" interstate commerce. The decision has taken an evenhanded regulation with no demonstrated economic impact on interstate or out-of-state commerce and invalidated that regulation because it may affect out-of-state behavior. The decision's creation of a new Commerce Clause test erases any distinction between what is truly national and what is truly local, *U.S. v. Lopez*, 1151 S. Ct. at 1634, and leaves states uncertain as to the real reach of the Commerce Clause.

Damage to legal certainty and precision combined with the specter of other courts following this decision will have a chilling impact on the ability of states to regulate, particularly matters related to safeguarding public health and the environment. The decision will have that impact because it creates a powerful, flexible, relatively easy-to-use tool for any entity seeking to eliminate a regulation perceived as particularly burdensome.

An irrebuttable presumption of unconstitutionality that does not require a plaintiff to show a discriminatory economic motive or effect is powerful because its result is to invalidate a law or regulation passed by a democratically elected legislature. The decision's analysis is flexible because any evenhanded regulation affects, to some extent, policies or commerce in other states (particularly in this era of electronic and instantaneous

commercial transactions), and therefore the analysis can be followed to relieve any activity from state regulation. The decision creates a relatively easy-to-use method of eliminating an objectionable law by applying a less rigorous standard of proof than the other two prongs of the traditional test, while affording a state no opportunity to show that competing in-state concerns, or the absence of reasonable alternatives, or the absence of economic discrimination, should save the law.

The decision tips the federal-state balance of commercial power in the opposite direction of *U.S. v. Lopez*. This court should grant this petition in order to restore that balance and remove the decision's threat to states' evenhanded attempts to regulate.

IV. THE DECISION PROHIBITS STATE REGULATION AUTHORIZED BY THIS COURT, ALLOWING PLAINTIFFS TO CIRCUMVENT AN EVENHANDED STATE LAW.

The decision creates a new third non-economic prong to the two-tiered Commerce Clause test and subsumes the existing two tiers under that third prong, violating the principles long established by this court. By subsuming those principles under a facial inquiry into the speculated effect of a state statute on commerce outside that state, and creating an effect-based version of the *Pike v. Church* balancing test, the decision prevents states from doing what this court has expressly authorized, which is to regulate evenhandedly. *Pike v. Bruce Church, Inc.*, 397 U.S. at 137; *City of Philadelphia v. New Jersey*, 437 U.S. at 626. Moreover, the decision imposes such a draconian test without any finding of economic harm.

It is axiomatic that the Commerce Clause prohibits only economic protectionism and trade barriers. *City of*

Philadelphia v. New Jersey, 437 U.S. at 623-24. *See also, Hazardous Waste Treatment Council v. State of South Carolina*, 945 F.2d 781, 789 (4th Cir. 1991) (citing *New Energy Co. of Indiana v. Limbach*, 486 U.S. at 273-4) (Commerce Clause "directly limits the power of the states to discriminate against interstate commerce" and "prohibits economic protectionism--that is regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors"); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. at 471-72 n.15 (Commerce Clause prohibits economic protectionism, having either discriminatory effect or purpose); *West Lynn Creamery, Inc. v. Healy*, 114 S. Ct. 2205, 2215 (1994) (state law must be trade barrier and discriminate to violate Commerce Clause); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522 (1935) (chief purpose of Commerce Clause was to prevent customs barriers and other economic retaliation). The decision violates this court's precedent by striking down a state law that constitutes neither.

This court has prescribed the application of one of two analyses to a dormant Commerce Clause claim. The first is applied to a regulation that clearly discriminates against interstate commerce, and the inquiry is whether the discrimination is justified by a valid factor unrelated to economic protectionism. This review, known as heightened scrutiny, amounts to a "virtual per se rule of invalidity." The second is applied to a statute that regulates evenhandedly, with only incidental impact on interstate commerce, and the inquiry is whether that impact is clearly excessive in relation to local benefits. This review, known as the *Pike* balancing test, examines the nature of the local interest and whether that interest could be promoted as well with lesser impact on interstate commerce. *C&A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. at 1682 (1994); *Maine v. Taylor*, 477 U.S. 131, 138 (1986); *City of Philadelphia v. New Jersey*, 437 U.S. at 623-24; *Pike v. Bruce Church Inc.*, 397 U.S. at 142.

Under the first and more strict test, the plaintiff has the burden of showing discrimination, either on the face of the statute or in practical effect, and the state has the burden of showing that the statute serves a legitimate local purpose which could not be served as well by nondiscriminatory means. *Maine v. Taylor*, 477 U.S. at 138. Under the second balancing test, the burden is on the plaintiff to show the impact on interstate commerce is overly oppressive. *Id.*

Discrimination as used to describe a regulation that must undergo heightened scrutiny has been defined by this court to mean "differential treatment of in-state and out-of-state economic interests that benefits the former *and* burdens the latter." *Oregon Waste Systems v. Dept. of Env. Quality*, 114 S. Ct. 1345, 1350 (1994) (emphasis added); *New Energy Co. of Indiana v. Limbach*, 486 U.S. at 273. A statute discriminates if its effect is to favor interstate economic interests over out-of-state economic interests. *Government Suppliers*, 975 F.2d at 1278; *Brown-Forman Distillers*, 476 U.S. at 579; *SDDS, Inc., v. State of South Dakota*, 47 F.3d 263, 271 n.12 (8th Cir. 1995) (state action must discriminate to violate Commerce Clause; discrimination exists where state action exports costs to out-of-staters). Facially evenhanded legislation is discriminatory in practical effect only where the state law advantages in-state activities relative to out-of-state activities in the same market. *Norfolk Southern Corp. v. Oberly*, 822 F.2d 388, 402 n.19 (3rd Cir. 1987). Discrimination must mean some form of economic protectionism. *City of Philadelphia v. New Jersey*, 437 U.S. at 623-24.

The effective recycling program provision does not discriminate because it neither imposes undue burdens on out-of-state commerce nor favors the interests of in-state commerce. That the effective recycling program component may indirectly affect waste that never enters Wisconsin at the same time that it addresses waste that

is sent to Wisconsin does not suffice to show an improper burden on interstate commerce. Moreover, because non-Wisconsin generators of waste disposed of in Wisconsin share the interest of Wisconsin generators of waste dumped in Wisconsin in conserving Wisconsin landfill capacity, the effective recycling program component promotes in- and out-of-state interests equally--the program saves landfill capacity for waste no matter what its origin.

Because the effective recycling program provision is not discriminatory, as defined by this court in the cases cited above, it must be subjected to the *Pike v. Church* balancing test. The record at trial established, and the district court found, that the Wisconsin law has little effect at all on interstate commerce and no economically adverse effect on out-of-state commerce. App. at 43-47. By contrast, the benefits flowing from the law are substantial.[5] The resulting overwhelming balance in favor of the recycling law reflects, and confirms, its nondiscriminatory nature.

In sum, it is the discrimination against interstate as opposed to intrastate movement of goods, rather than the restriction of interstate activity per se, that triggers heightened scrutiny. *See, City of Philadelphia*, 437 U.S. at 626 (it would be permissible to protect the environment by slowing all waste into New Jersey landfills). Wisconsin

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[5]The district court found those benefits to include: "Conserving landfill space, reducing the risk of environmental contamination and remediation costs by siting fewer new landfills, reducing the risk of environmental contamination and remediation costs from landfilling certain listed recyclable materials, conservation of raw materials and natural resources, conservation of energy and resources used to manufacture products from raw materials rather than from recyclable materials and stimulation of new markets and technologies for recyclable materials." App. at 46.

has chosen to slow all waste into its landfills by minimizing the amount of recyclable materials in the waste it accepts, and the mechanism for achieving that minimization applies equally in and out of state. Because the burdens imposed by that mechanism on interstate and out-of-state commerce are minimal and benign, and because the benefits served by that mechanism are substantial, the Wisconsin law does not offend the Commerce Clause. This court should grant this petition to restore to states the authority to regulate evenhandedly.

V. THE DECISION'S INVALIDATION OF AN EVENHANDED STATE STATUTE UNDER THE NEW THIRD PRONG DIRECTLY CONFLICTS WITH THE EIGHTH CIRCUIT'S APPLICATION OF THE THIRD PRONG TO AN EVENHANDED STATE STATUTE IN *COTTO WAXO CO. V. WILLIAMS*.

If this court decides to countenance the circuits' creation of an independent third Commerce Clause test, it must nevertheless clarify the application of that test to evenhanded state regulation. The decision in *Cotto Waxo Co. v. Williams*, 46 F.3d 790 (8th Cir. 1995), holding that Minnesota's ban on the sale of petroleum-based sweeping compounds in Minnesota does not have an improper extraterritorial reach, directly conflicts with this decision's invalidation of the equally evenhanded Wisconsin Recycling Law. Footnote 10 of this decision notwithstanding, App. 19, it is precisely the Seventh Circuit's distinct analysis of the issue of extraterritoriality that subsume the traditional Commerce Clause analyses and strikes down Wisconsin's law.

VI. THE DECISION DEALS A SEVERE BLOW TO RECYCLING IN WISCONSIN AND TO THE RECYCLING INDUSTRY NATIONWIDE.

The practical effect of the decision is to construe a statute whose purpose is to let in waste that keeps out recyclable materials, so as to let in waste that keeps in recyclable materials. If a hauler can show that a load of waste contains no recyclable materials, that waste is allowed in Wisconsin landfills. Plaintiffs never offered to show that the 75 percent of out-of-state waste that is non-industrial waste does not contain recyclable materials. The decision allows plaintiffs to circumvent the Wisconsin ban on recyclable materials and to eliminate the Wisconsin recycling law as it applies to out-of-state waste. The waste industry does not have a vested right to an unregulated market, and the Commerce Clause should not be used as the vehicle for getting around Wisconsin's ban on recyclable materials.

To the extent that out-of-state waste can circumvent Wisconsin's Recycling Law, pressures will mount to dilute if not unravel the in-state recycling program established under that law. The environmental benefits of the effective recycling program provision will be lost. More significantly for interstate commerce, the record at trial showed that the national recycling industry depends on the stable supply of recycling markets assured by the effective recycling program component of Wisconsin's law. The growth of that industry, and the continued development of recycling technology, are compromised by this decision's invalidation of that component. This court should grant this petition to undo that direct threat to interstate commerce in recycling.

CONCLUSION

This petition for certiorari review should be granted for the reasons state above.

Respectfully submitted this 15th day of December, 1995.

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December 15, 1995

95-1079

No. _____

Supreme Court, U.S.
FILED
DEC 18 1995
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In The

Supreme Court of the United States

October Term, 1995

GEORGE MEYER,

Petitioner,

v.

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, VALLEY SANITATION COMPANY, INC., LAND RECLAMATION COMPANY, and WASTE MANAGEMENT OF WISCONSIN, INC.,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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December 15, 1995

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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 94-4006, 95-1058

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, VALLEY SANITATION COMPANY, INC., LAND RECLAMATION COMPANY and WASTE MANAGEMENT OF WISCONSIN, INC.,

Plaintiffs-Appellants,

v.

GEORGE MEYER, in his official capacity as Secretary of the Wisconsin Department of Natural Resources,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 94 C 603 -- John C. Shabaz, Judge.

ARGUED MARCH 28, 1995
DECIDED AUGUST 23, 1995
PETITION FOR REHEARING AND SUGGESTION
FOR REHEARING EN BANC DENIED
SEPTEMBER 20, 1995

Before BAUER, EASTERBROOK and RIPPLE, Circuit Judges.

RIPPLE, Circuit Judge. In this appeal, a solid waste trade association and several Wisconsin landfill operators bring a Commerce Clause challenge against a Wisconsin statute. The statute forbids waste generators from using the State's landfills unless they generate waste in a region that has adopted an "effective recycling program," as defined by Wisconsin law. The district court, while striking down other sections of the statute, upheld the sections under review here. It reasoned that these sections did not discriminate against interstate commerce and that the local benefits outweighed the burdens imposed on interstate commerce. For the reasons that follow, we reverse and remand for further proceedings.

I
BACKGROUND

A. *Facts*

Over the last decade, fewer and fewer solid waste landfills have remained available in Wisconsin to dispose of a steadily increasing amount of waste. In response to this situation, Wisconsin enacted legislation designed to manage the flow of solid waste into its landfills. In relevant part, the statute bars individuals from disposing of eleven specifically enumerated recyclable materials in the State's solid waste landfills. Wis. Stat. sec. 159.07(3).[1] Thus, waste containing any of these items

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[1]The statute provides, in relevant part:

Beginning on January 1, 1995, no person may dispose of in a solid waste disposal facility or burn without energy recovery in a solid waste treatment facility in this state any of the following: (a) An aluminum container.

(b) Corrugated paper or other container board.

(c) Foam polystyrene packaging.

(d) A glass container.

(e) A magazine or other material printed on similar paper.

may not be dumped in the State.

The statute recognizes, however, an exception to this general prohibition. Under the exception, both in-state and out-of-state generators of solid, non-medical waste may send waste that contains quantities of the banned items to Wisconsin landfills if the waste is generated "in a region that has an effective recycling program as determined under [Wis. Stat.] sec. 159.11." *See* Wis. Stat. sec. 159.07(7)(a).[2] Section 159.11 of the statute initially provides that all such programs, whether for communities within Wisconsin or beyond its borders, are subject to approval by the Wisconsin Department of Natural Resources. *Id.* sec. 159.11(1). The statute then outlines the requirements of the "effective recycling program." First, each program must contain a "public education component" detailing reasons and opportunities for recycling, as well as prohibitions on dumping the eleven

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(f) A newspaper or other material printed on newsprint.
(g) Office paper.
(h) A plastic container.
(i) A steel container.
(j) A waste tire, as defined in sec. 84.078(1)(b).
(k) A container for carbonated or malt beverages that is primarily made of a combination of steel and aluminum.
Wis. Stat. sec. 159.07(3).

[2] At the time this lawsuit was filed, sec. 159.07(7) provided, in pertinent part: The prohibitions in [sec. 159.07(3)] do not apply with respect to solid waste, except medical waste . . . that is generated in a region that has an effective recycling program, as determined under sec. 159.11, and, if the region is not in this state, the region is located in a state that has an effective siting program, as deter- mined under sec. 159.12. Wis. Stat. sec. 159.07(7)(a). As we note later, the district court struck down the "effective siting" portion of the statute on the ground that it was facially discriminatory and lacked sufficient justification.

items referred to above. *Id.* sec. 159.11(2)(a). Effective recycling programs also must mandate that all of the community's single-family residences and commercial, retail, industrial, and governmental facilities engage in waste-reducing behaviors. Specifically, the statute mandates that these entities either separate the eleven listed materials from their waste or ensure that the waste is treated at a facility that will recover the materials prior to disposal. *See id.* sec. 159.11(2)(b). In addition, all owners of residential buildings containing five or more units, as well as owners of commercial, retail, industrial, and governmental facilities, must provide recycling containers for the occupants of the facility, must ensure that recyclables generated at the site are collected, and must regularly notify occupants of available recycling programs, unless waste from the site is treated at a materials recovery facility. *See id.* sec. 159.11(2)(c), (d). These requirements apply to all waste generators and facility owners in the community, irrespective of whether they, or, in the case of facilities, their occupants, actually dump waste in Wisconsin.

Enacting communities must meet several additional requirements. For example, the effective recycling program must establish systems for collecting separated recyclable materials from the region's single-family residences, *id.* sec. 159.11(e), as well as for processing and marketing the recyclables the community collects, *id.* sec. 159.11(em). The community must prohibit the disposal, in either a solid waste disposal or treatment facility, of any of the eleven listed items that have been separated for recycling. *Id.* sec. 159.11(2)(er). In addition, communities must adhere to any additional rules promulgated by the Wisconsin Department of Natural Resources. *id.* sec. 159.11(2)(f). Every community also must provide for "[a]dequate enforcement" of the programs established under the statute, *id.* sec. 159.11 (2)(g), acquire all the equipment necessary to implement those programs, *id.* sec. 159.11(2)(h), and make a

"reasonable effort" to reduce the "amount, by weight" of the eleven listed materials generated as solid waste in the region, *id.* sec. 159.11(2)(i). With respect to non-Wisconsin communities, the statute mandates that they comply with any recycling laws of their home state as well as with the requirements of the Wisconsin statute. *Id.* sec. 159.11(2e)(a). The statute directs the Wisconsin Department of Natural Resources to promulgate rules for comparing the programs of non-Wisconsin municipalities to Wisconsin municipalities or counties. *See id.* sec. 159.09(1). Areas of comparison must include the level of financing, enforcement mechanisms and effort, and the number of materials being separated and recycled. *Id.* sec. 159.11(2e)(b).

The most significant feature of the Wisconsin statute, for purposes of this case, is the requirement, discussed above, that all citizens in the effective recycling community must observe the statute's recycling provisions, whether or not they actually dump waste in Wisconsin. *See id.* 159.11(2)(b), (c), (d); *see also id.* sec. 159.11(2)(g) (obligating communities to establish effective enforcement provisions). With respect to out-of-state communities, the statute thus obligates every waste generator in a community with an effective recycling program to adhere to Wisconsin's standards, either by separating out recyclable materials or by sending waste to a materials recovery facility, even if their waste is intended for dumps in Illinois, Minnesota, or Iowa. Everyone in the community either must separate recyclables or must use a materials recovery facility in order for anyone to receive access to Wisconsin's landfills.

B. *Earlier Proceedings*

Appellants National Solid Wastes Management Association, Valley Sanitation Co., Land Reclamation Co.,

and Waste Management of Wisconsin, Inc. ("NSWM"),[3] challenged the Wisconsin solid waste legislation under the Commerce Clause and 42 U.S.C. sec. 1983. The district court accepted NSWM's argument in part, and held unconstitutional two portions of the legislation, R.61 at 14-16; Wisconsin has not appealed that decision. The district court held infirm the statute's "formal rulemaking" and "effective siting" requirements. The former provision mandated that the Wisconsin Department of Natural Resources approve non-Wisconsin communities' effective recycling programs via formal rulemaking. Wis. Stat. sec. 159.11(1) (1993). No such requirement applied to in-state communities. The latter provision barred Wisconsin landfills from accepting solid waste from any state unless the amount of new solid waste disposal capacity sited in that state during the past four years exceeded the amount of waste the state generated during that period. *Id.* sec. 159.12(3).

The district court rejected, however, NSWM's claim that Wisconsin's "effective recycling program" requirement violated the Commerce Clause. The court determined that the requirement was neither facially discriminatory, nor discriminatory in practical effect. Therefore, it evaluated the statute under the balancing test the Supreme Court set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Because factual disputes existed concerning "the extent of the burden imposed upon out-of-state communities," the district court declined to grant either party summary judgment. R.61 at 13.

Following a bench trial, the court ruled in favor of the State. It concluded that the Wisconsin statute's "sole

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[3] NSWM is a not-for-profit solid waste management trade association. The other three plaintiff-appellants are owners and operators of Wisconsin landfills that accepted out-of- state waste in 1993. They collectively will be referred to as "NSWM."

burden on commerce is the requirement that out-of-state municipalities would be required to recycle all waste, 80 percent of which will not be sent to Wisconsin landfills." Tr.III at 230. The court reasoned, however, that "the cost to change [to a Wisconsin-approved recycling program]" and "the administrative burden" of compliance "would be limited." *Id.* at 234-35. Next, it found that the statute would provide several local benefits, particularly the conservation of landfill capacity and the protection of the environment. The court concluded that the statute's putative local benefits outweighed its "small burden on interstate commerce," *id.* at 238, and dismissed NSWM's remaining claims with prejudice.

II
DISCUSSION

Our standard of review following a bench trial in the district court is well established. We review the district court's factual findings for clear error. Fed. R. Civ. P. 52(a); *Thornton v. Brown*, 47 F.3d 194, 196 (7th Cir. 1995); *see Maine v. Taylor*, 477 U.S. 131, 144-45 (1986) (applying standard in Commerce Clause context) (citing *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985)). We review the district court's legal conclusions, including its determination that the Wisconsin statute did not discriminate against interstate commerce, de novo. *Market St. Assocs. Ltd. Partnership v. Frey*, 21 F.3d 782, 785 (7th Cir. 1994); *cf. Government Suppliers Consolidating Servs., Inc. v. Bayh*, 975 F.2d 1267, 1278-83 (7th Cir. 1992) (reviewing Commerce Clause challenge to state municipal solid waste statute), *cert. denied*, 113 S. Ct. 977 (1993).

NSWM submits that the Wisconsin statute violates the Commerce Clause per se because it regulates commerce occurring wholly outside Wisconsin. It notes that the statute conditions dumping access on the observance of an "effective recycling program" by all

residents of a municipality, whether or not they actually dump waste in Wisconsin. NSWM also submits that the statute should receive strict scrutiny because it treats similar products differently depending upon their point of origin. It argues that the statute does not survive strict scrutiny because Wisconsin may serve adequately its goals of preserving dwindling landfill space and protecting the environment through reasonable non-discriminatory alternatives.[4] Alternatively, NSWM claims that the Wisconsin program fails the *Pike* test because its burden on interstate commerce is significant. Finally, it submits that the district court erred in dismissing its sec. 1983 claims even though the court found two provisions of the Wisconsin statute unconstitutional.

A. *Commerce Clause*

1.

The Commerce Clause grants Congress the power "[t]o regulate Commerce . . . among the several states." U.S. Const. art. I, sec. 8, cl. 3. Although this language does not expressly limit the states' ability to interfere with interstate commerce, the Supreme Court consistently has held that the Clause contains a further negative command, known as the "dormant Commerce Clause," which "prohibits States from taking certain actions

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[4] For example, NSWM notes, the State could narrow the scope of its law to apply only to individuals who dispose of waste in Wisconsin. Wisconsin could also require those who haul waste into the State to ensure that their customers comply with Wisconsin's mandates. Moreover, Wisconsin could mandate that all waste be treated at a "materials recovery facility" ("MRF") prior to dumping. Such treatment would eliminate the need for an individual to separate out recyclable materials. Indeed, NSWM notes, the current statute permits generators to use MRFs in lieu of separating out recyclables, but only if the waste generator resides in a community that has adopted an effective recycling program.

respecting interstate commerce even absent congressional action." *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 87 (1987); *see also Oregon Waste Sys. v. Department of Envtl. Quality*, 114 S. Ct. 1345, 1349 (1994); *Alliance for Clean Coal v. Miller*, 44 F.3d 591, 595 (7th Cir. 1995). In essence, "[t]he 'negative' or 'dormant' aspect of the Commerce Clause prohibits States from advancing their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state." *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 504 U.S. 353, 359 (1992) (quotation and citation omitted). The dormant Commerce Clause applies with full force to state regulation of the collection, transportation, processing, and disposal of solid waste.[5]

The Supreme Court has adopted what amount to a two-tiered approach to analyzing state economic regulation under the Commerce Clause. *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 578-79 (1986).[6] When a state statute directly regulates or discriminates against interstate commerce, or

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[5] See C & A Carbone, Inc. v. Town of Clarkstown, 114 S. Ct. 1677, 1682 (1994) ("[W]hat makes garbage a profitable business is not its own worth but the fact that its possessor must pay to get rid of it. In other words, the article of commerce is not so much the solid waste itself, but rather the service of processing and disposing of it."); Fort Gratiot Sanitary Landfill, Inc., 504 U.S. at 359 ("Solid waste, even if it has no value, is an article of commerce.") (citing Philadelphia v. New Jersey, 437 U.S. 617, 622-23 (1978)); Government Suppliers Consolidating Servs., Inc., 975 F.2d at 1277 ("Garbage is, under the prevailing case law of the Supreme Court, indisputably an article of commerce[.]").

[6] See Scariano v. Justices of the Supreme Court, 38 F.3d 920, 926 (7th Cir. 1994), cert denied, 115 S. Ct. 2582 (1995)(noting that these two approaches govern dormant Commerce Clause analysis).

when its effect is to favor in-state economic interests over out-of-state interests, the Court generally has "struck down the statute without further inquiry." *Brown-Forman Distillers Corp.*, 476 U.S. at 579 (citations omitted).[7] When, however, a state statute is neutral on its face, has only indirect or incidental effects on interstate commerce, and regulates evenhandedly, it is analyzed under a second test. *See C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677, 1682 (1994); *Brown-Forman Distillers Corp.*, 476 U.S. at 579. Under this approach, the state statute will be upheld "unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The Supreme Court also has noted that "there is no clear line" separating the category of state regulation that is virtually per se invalid and the category subject to the *Pike* test. *Brown-Forman Distillers Corp.*, 476 U.S. at 579; *cf. National Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1131 (7th Cir.) (treating cases involving facially discriminatory statutes and those involving statutes with "powerful" discriminatory effects as separate categories subject to the same rigorous scrutiny), *cert. denied*, 115 S. Ct. 2579 (1995). The "critical consideration" in determining the appropriate degree of scrutiny is the "over-all effect of the statute on both local and interstate activity." *Brown-Forman Distillers Corp.*, 476 U.S. at 579; *Government Suppliers Consolidating Servs., Inc.*, 975 F.2d at 1277. Having set forth the governing principles, we now consider whether Wisconsin's solid waste legislation runs afoul of the Commerce Clause.

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[7] See Alliance for Clean Coal, 44 F.3d at 595 (noting that such state statutes are "subject to the strictest scrutiny") (quotation and citation omitted).

B. *The Wisconsin Statute*

1.

The Wisconsin statute provides that both in-state and out-of-state waste generators are barred from dumping listed materials in Wisconsin landfills unless they reside in a community that has adopted an "effective recycling program." Wis. Stat. sec. 159.07(7)(a); *see also id.* sec. 159.07(3); sec. 159.11. Focusing upon this universal requirement, the district court reasoned that the Wisconsin statute did not merit heightened scrutiny because it was neither facially discriminatory nor discriminatory in practical effect. We find ourselves in respectful disagreement with the district court's conclusion. As we held in *Government Suppliers Consolidating Services, Inc.*, the " 'critical consideration is the overall effect of the statute on both local and interstate activity.' " 975 F.2d at 1278 (quoting *Brown-Forman Distillers Corp.*, 476 U.S. at 573). When considering the purpose of the challenged statute, we are not bound by the description given it by the legislature; it is our duty to determine the practical effect of the law. *Id.*

Wisconsin's solid waste legislation conditions the use of Wisconsin landfills by non-Wisconsin waste generators on their home communities' adoption and enforcement of Wisconsin recycling standards; all persons in that non-Wisconsin community must adhere to the Wisconsin standards whether or not they dump their waste in Wisconsin. If the out-of-state community does not conform to the Wisconsin way of doing things, no waste generator in that community may utilize a Wisconsin disposal site. *See* Wis. Stat. sec. 159.11(2)(b). The practical impact of the Wisconsin statute on economic activity completely outside the State reveals its basic infirmity: It essentially controls the conduct of those engaged in commerce occurring wholly outside the State of Wisconsin and therefore directly regulates interstate commerce. In *Healy v. Beer Institute*, 491 U.S. 324 (1989),

the Supreme Court, through the pen of Justice Blackmun, noted that "a state law that has the 'practical effect' of regulating commerce occurring wholly outside that State's borders is invalid under the Commerce Clause." *Id.* at 332. The Court later elaborated:

> First, the Commerce Clause precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State, and, specifically, a State may not adopt legislation that has the practical effect of establishing a scale of prices for use in other states[.] Second, a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature. The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State. Third, the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation.

Id. at 336 (internal quotations and citations omitted).

Healy is consistent with a long line of cases that considered whether state laws violated the Commerce Clause by regulating or controlling commerce occurring

wholly outside the legislating state.[8] These cases make clear that the Court will not hesitate to strike down a state law shown to have extraterritorial scope and an adverse impact on commerce occurring wholly outside the enacting state. For example, in *Healy*, the challenged Connecticut statute required out-of-state shippers of beer to agree that the prices they charged Connecticut wholesalers would be no higher than the prices charged the previous month in any state bordering Connecticut. *See id.* at 327. In *Brown-Forman Distillers Corp.*, the challenged New York statute similarly required liquor distillers to agree that they would charge New York wholesalers a price no higher than the lowest price charged to any other wholesaler in the United States. *See* 476 U.S. at 576. The Supreme Court reasoned that each statute violated the Commerce Clause because it "require[d] out-of-state shippers to forgo the

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[8] Brown-Forman Distillers Corp., 476 U.S. at 579 (noting that "[w]hen a state statute directly regulates . . . interstate commerce . . . we have generally struck down the statute without further inquiry"); Edgar v. MITE Corp., 457 U.S. 624, 643 (1982) (plurality op.) ("[A]ny attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power."); see also Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 521 (1935) ("New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there."); cf. Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35, 43 (1966) (stating that the "mere fact" that the statute at issue was "geared to appellants' pricing policies in other States [was] not sufficient to invalidate" it, and noting that the case at hand did not present evidence of the statute's extraterritorial effects which could be considered "when a case arises that clearly presents them"), overruled, Healy v. Beer Inst., 491 U.S. 324, 343 (1989) ("[T]o the extent that Seagram holds that retrospective affirmation statutes do not facially violate the Commerce Clause, it is no longer good law.").

implementation of competitive-pricing schemes in out-of-state markets because those pricing decisions [were] imported by statute into the [enacting state's] market regardless of local competitive conditions." *Healy*, 491 U.S. at 339; *see also Brown-Forman Distillers Corp.*, 476 U.S. at 583-84; *cf. Baldwin v. G.A.F. Seelig*, Inc., 294 U.S. 511, 520-25 (1935) (striking down New York statute that required out-of-state milk to be sold at prices no less than those set by statute for milk produced in New York; the statute eliminated the competitive advantage enjoyed by milk producers in neighboring Vermont). Likewise, in *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), the Court reviewed an Illinois law that required any takeover offer for shares of a "target company" to be registered with the Illinois Secretary of State. *See id.* at 626-27. The statute defined "target company" as any company in which Illinois shareholders owned ten percent of the securities subject to the takeover offer, or any company that met two of the following criteria: It was organized under Illinois law; its principal place of business was in Illinois; or, it had at least ten percent of its stated capital and paid-in surplus in Illinois. *See id.* at 627. The statute gave the Illinois Secretary of State the authority to hold hearings concerning the fairness of the offer, as well as the power to deny registration to any tender offer that, in his opinion, either failed to provide full disclosure of material information or was inequitable. *See id.* A plurality of the Court reasoned that the Illinois law was infirm because of its "sweeping extraterritorial effect":

> [T]he Illinois law, unless complied with, sought to prevent MITE [a Delaware corporation with principal offices in Connecticut] from making its offer and concluding interstate transactions not only with [the target's] stockholders living in Illinois, but also with those living in other States and having no connection with Illinois. Indeed, the Illinois law on its face

> would apply even if not a single one of [target's] shareholders were a resident of Illinois. . . . Thus the Act could be applied to regulate a tender offer which would not affect a single Illinois shareholder.

Id. at 642 (plurality op.). *Healy, Brown-Forman Distillers Corp.*, and *MITE Corp.* thus establish that the Commerce Clause constrains a state from projecting its economic legislation onto commerce wholly occurring in its sister states. *Cf. K-S Pharmacies, Inc. v. American Home Products Corp.*, 962 F.2d 728, 730 (7th Cir. 1992) ("No state may require sellers to charge the same price within its borders as they charge elsewhere.")

Although cases like *Healy* and *Brown-Forman Distillers Corp.* involved price affirmation statutes, the principles set forth in these decisions are not limited to that context. *Healy* itself discusses the general principle that "the Commerce Clause precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State," and then refers to the more "specific[ ]" application of that principle, that "a State may not adopt legislation that has the practical effect of establishing a scale of prices for use in other states[.]" *See* Healy, 491 U.S. at 336 (quotation and citation omitted). The breadth of the principle is demonstrated by its use by the plurality in *MITE Corp.* Indeed, only recently the Court has commented, in a case involving state regulation of solid waste processing, that "States and localities may not attach restrictions to exports or imports in order to control commerce in other states." *C & A Carbone, Inc.*, 114 S. Ct. at 1683 (citing *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935)).

The prohibition against direct regulation of interstate commerce by the states has been applied consistently by the circuits. In *NCAA v. Miller*, 10 F.3d

633 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1543 (1994), the Court of Appeals for the Ninth Circuit held that a Nevada statute that required different procedures in Nevada collegiate athletic association enforcement proceedings than those employed by the NCAA in other states violated the Commerce Clause because it regulated directly interstate commerce. Noting that the NCAA could operate only with uniform procedures in its enforcement proceedings, the court held that the practical effect of the Nevada statute was to require the NCAA to conduct all of its proceedings under the Nevada requirements. "The Statute would force the NCAA to regulate the integrity of its product in every state according to Nevada's procedural rules. . . . In this way, the Statute could control the regulation of the integrity of a product in interstate commerce that occurs wholly outside Nevada's borders." *Id.* at 639. Moreover, noted the court, Nevada is not the only state that has enacted or could enact legislation that establishes rules for NCAA proceedings. "The serious risk of inconsistent obligations wrought by the extraterritorial effect of the Statute demonstrates why it constitutes a per se violation of the Commerce Clause." *Id.* at 640.[9]

We are not the first circuit to be confronted with the problem of extraterritoriality in the context of waste

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[9]See also Cotto Waxo Co. v. Williams, 46 F.3d 790, 794 (8th Cir. 1995) (stating generally that "a statute has extraterritorial reach when it necessarily requires out-of-state commerce to be conducted according to in-state terms"); Old Bridge Chems., Inc. v. New Jersey Dep't of Envtl. Protection, 965 F.2d 1287, 1293 (3d Cir.) ("The Supreme Court has invalidated state statutes where a state has 'projected' its legislation into other states and directly regulated commerce therein, thereby either forcing individuals to abandon commerce in other states or forcing other states to alter their regulations to conform with the conflicting legislation.") (collecting cases), cert. denied, 113 S. Ct. 602 (1992).

regulation. Our colleagues in the Tenth Circuit confronted a similar situation in *Hardage v. Atkins*, 619 F.2d 871 (10th Cir. 1980). In that case, the court considered an Oklahoma statute similar to Wisconsin's solid waste legislation. In relevant part, the Oklahoma law prohibited out-of-state hazardous waste generators from shipping their waste to Oklahoma disposal facilities unless their home state had adopted "substantially similar standards for controlled industrial waste disposal as those which Oklahoma ha[d] enacted." *Id.* at 873. The court concluded that the statute violated the Commerce Clause:

> [Oklahoma's law] imposes an economic embargo on all incoming shipments, unless and until the state of origin enacts a law prescribing standards which are substantially similar to those of Oklahoma. It thus reaches out and seeks to force the enactment in the state of origin of a statute with standards similar to Oklahoma['s] . . . Oklahoma is forcing its judgment with respect to hazardous wastes on its sister states at the pain of an absolute ban on the interstate flow of commerce. As we view the situation, Oklahoma cannot use the threat of economic isolation as a weapon to force other states to enact substantially similar legislation any more than Oklahoma can impose a reciprocity agreement against a sister state. Thus, the mandatory nature of the device or implement is the objectionable part.

Id. (quotations and internal citations omitted).

We believe that the Tenth Circuit has characterized the situation fairly and accurately. Like the Oklahoma statute in *Hardage*, the Wisconsin statute seeks to force Wisconsin's judgment with respect to solid

waste recycling on communities in its sister states "at the pain of an absolute ban on the flow of interstate commerce." *See* Baldwin, 294 U.S. at 524 ("One state may not put pressure . . . upon others to reform their economic standards. If farmers or manufacturers in Vermont are abandoning farms or factories, or are failing to maintain them properly, the legislature of Vermont and not that of New York must supply the fitting remedy."); *cf. New Energy Co. v. Limbach*, 486 U.S. 269, 274-76 (1988) (holding that Ohio law which denied favorable tax treatment to out-of-state ethanol producers unless their states of origin afforded similar treatment to Ohio producers discriminated against interstate commerce); *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 375-81 (1976) (striking down a reciprocity agreement with respect to sale of milk as discriminatory against interstate commerce). The practical effect of the Wisconsin legislation is to impose the requirements of Wisconsin law on numerous waste generators who neither reside, nor dispose of their waste in Wisconsin; eighty percent of the out-of-state waste subject to this legislation is destined for non-Wisconsin landfills. Out-of-state waste generators who do not dump in Wisconsin but who are located in communities adhering to Wisconsin's "effective recycling program" must therefore bear the costs of complying with the Wisconsin law while their competitors in non-effective recycling communities, who may be dumping solid waste at the very same non-Wisconsin landfill, do not. The Wisconsin statute reaches across the Wisconsin state line and regulates commerce occurring wholly outside Wisconsin. As a price for access to the Wisconsin market, it attempts to assume control of the integrity of the product that is moving in interstate commerce. Wisconsin's approach to sound solid waste management, and no one else's, must govern, even when the product will never cross its borders. The Commerce Clause contemplates a very different market among the states of the Union.

This situation is analogous to the one that confronted the Supreme Court in *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266 (1987). There, the Court was confronted with an unapportioned flat tax on interstate motor vehicles. The Court held that the tax violated the Commerce Clause because it failed the "internal consistency test." The state tax, if imposed by every state, would certainly have placed a burden on the interstate hauler and impeded the flow of interstate commerce. *Cf. Oklahoma Tax Comm'n v. Jefferson Lines*, 115 S. Ct. 1331 (1995) (holding that a sales tax on a bus ticket sold within the state did not violate the dormant Commerce Clause; the tax's identical application by all states would not result in a disadvantage to interstate commerce because each sale would result in one tax).

2.

Although we have characterized the Wisconsin statute as impermissibly regulating directly interstate commerce, we note that the practical effect of the statute could also be analyzed as working a discrimination on interstate commerce. Because Wisconsin's effective recycling program legislation "discriminate[s] in practical effect against interstate commerce, [it is] subject to the higher level of scrutiny," and the State is required to demonstrate that its concerns "cannot be adequately served by nondiscriminatory alternatives." *Government Suppliers Consolidating Servs., Inc.*, 975 F.2d at 1279 (quotation and citation omitted); *see Fort Gratiot Sanitary Landfill, Inc.*, 504 U.S. at 359; *Taylor*, 477 U.S. at 138.[10]

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[10]In Cotto Waxo Co. v. Williams, 46 F.3d 790 (8th Cir. 1995), the Eighth Circuit treated the issue of whether a state statute had an "extraterritorial reach" as a separate inquiry from the issue of whether the statute discriminated against interstate commerce. In its view, "[i]t may also be correct to say that 'extraterritorial reach' is a special example of 'directly'

The Wisconsin statute creates an embargo on waste from a hauler from another state, or a community within that state, unless that political entity has decided to adopt the Wisconsin view of environmental management. No matter what the alternate approaches to recycling may offer in terms of environmental benefits and costs, a waste generator/hauler can pass the Wisconsin border only if its community has opted for the Wisconsin plan. Similarly, the Wisconsin disposal site is deprived of the waste from out-of-state not because it is more noxious than waste produced the Wisconsin way, but simply because it comes from a community whose ways are not Wisconsin's ways. Moreover, the Wisconsin statute places the participant in interstate commerce in a difficult situation with respect to its participation in interstate commerce with other states. As we have noted earlier, if Wisconsin can insist on interstate haulers doing things the Wisconsin way in order to obtain access to the Wisconsin market, other states can insist on similar or different prerequisites to their markets.

Wisconsin submits that it has no alternative means of ensuring that recyclables are eliminated from waste entering Wisconsin other than to require that non-Wisconsin municipalities require that all of their residents adhere to the Wisconsin-mandated recycling program even if the waste is not destined for Wisconsin.

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regulating interstate commerce. The Supreme Court has not clarified this point[.]" Id. at 793 n.3. The Eighth Circuit took the view that, if a statute has the forbidden extraterritorial effect, it is per se invalid. Id. at 793. A statute that commerce is invalid if there is not an important reason for that discrimination. We have no need to determine whether the issue of extraterritorial reach ought to be analyzed distinctly from the issue of discrimination against interstate commerce because, in any event, as we discuss later in this opinion, Wisconsin can proffer no sufficiently important reason for the statute.

Adherence to the program some of the time, i.e., when the waste is actually sent to Wisconsin, creates, the State argues, an impossible enforcement situation. We cannot accept this argument. The solid waste legislation itself makes clear that there is an available, less discriminatory alternative that could serve the State's purpose just as well as the requirement that the entire community follow the dictates of Wisconsin's plan. Specifically, the Wisconsin statute makes clear that, if the waste is processed by a materials recovery facility that separates the eleven listed materials, the waste will conform to the environmental needs of Wisconsin. Accordingly, Wisconsin could realize its goals of conserving landfill space and protecting the environment by mandating that all waste entering the State first be treated at a materials recovery facility with the capacity to effect this separation. Given the existence of such a nondiscriminatory alternative that serves adequately Wisconsin's legitimate concerns, the discriminatory legislation cannot be justified. *Cf. Taylor*, 477 U.S. at 151-52 (upholding state law banning importation of live baitfish because available inspection techniques could not adequately serve state's legitimate purpose of preventing native species from being exposed to parasites).[11]

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[11]With respect to NSWM's sec. 1983 claims, we note that the Supreme Court has held that Commerce Clause violations are cognizable under sec. 1983. See Dennis v. Higgins, 498 U.S. 439, 446, 451 (1991); see also Kleenwell Biohazard Waste & Gen. Ecology Consultants v. Nelson, 48 F.3d 391, 393 (9th Cir.), cert. denied, 115 S. Ct. 2580 (1995); Waste Sys. Corp. v. County of Martin, 985 F.2d 1381, 1389 (8th Cir. 1993). Thus, for the reasons set forth in the text, NSWM is entitled to such relief with respect to its claim concerning the effective recycling program. With respect to NSWM's other claims, the district court's December 15, 1994 summary judgment ruling granted NSWM's motion "as it concerns the rulemaking requirement found in the final sentence of sec. 159.11(1), Wis. Stats., and the effective siting requirement found at section 159.12(3), Wis.

3.

Given the nondiscriminatory and less burdensome methods that could be implemented to ensure the segregation of recyclable materials before the waste is committed to a Wisconsin landfill, we also note that, if it were necessary to reach the issue (or if our earlier characterizations of the Wisconsin scheme as discriminatory and a direct regulation of interstate commerce were found to be erroneous), the Wisconsin scheme still could not pass muster under the test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Under that approach, even when a state statute regulates interstate commerce indirectly and non-discriminatorily, the burden imposed on that commerce must "not be excessive in relation to the local interests served by the statute." *MITE Corp.*, 457 U.S. at 643. The need of Wisconsin to execute a sound and vigorous environmental policy is indeed substantial, but, as we have noted above, it has certainly not demonstrated in this litigation that it must pursue it in the way that it has. The State has no

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Stats." R.61 at 17. This ruling certainly appears to encompass NSWM's sec. 1983 claim based on the effective siting and formal rulemaking aspects of Wisconsin's solid waste legislation. However, the district court did not enter judgment with respect to these claims until after the bench trial. The court's December 29, 1994 order, entered following the bench trial, provided that judgment be entered that the rulemaking requirement in the final sentence of sec. 159.11(1), Wis. Stats., and the effective siting requirement found at section 159.12(3), Wis. Stats. violate the Commerce Clause of the United States Constitution and are invalid, and dismissing the remaining claims in plaintiffs' complaint with prejudice R.81. The district court erred in dismissing NSWM's sec. 1983 claim as it related to the "effective siting" and "formal rulemaking" provisions of the Wisconsin statute; its decision that these provisions violated the Commerce Clause entitled NSWM to sec. 1983 relief. See Higgins, 498 U.S. at 451.

legitimate interest in requiring that out-of-state generators conform to the Wisconsin plan when those entities are not going to transport the waste to Wisconsin. As we have just noted, Wisconsin has other means to protect its legitimate environmental interests. On the other hand, the burden on the out-of-state generator is substantial. The interstate generator and hauler must abide by Wisconsin rules even if the product is not bound for that State, if there are conflicting regulations in other jurisdictions, or if there is a more efficient and cost-effective method of transporting the waste. Accordingly, we conclude that the Wisconsin plan imposes a very significant burden on interstate commerce, a burden that far outweighs the permissible benefits that Wisconsin, as a member of the federal union, has a right to expect.

Conclusion

For the foregoing reasons, the judgment of the district court is reversed and the case remanded for further proceedings consistent with this opinion.

REVERSED and REMANDED

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 20, 1995

Before

Hon. WILLIAM J. BAUER, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, VALLEY SANITATION COMPANY, INC., LAND RECLAMATION COMPANY, and WASTE MANAGEMENT OF WISCONSIN, INC.,	]	Appeal from the United States District Court for the Western District of Wisconsin.
Plaintiff-Appellants,	]	
Nos. 94-4006 and 95-1058 v.	]	No. 94 C 603. John C. Shabaz, Judge.
GEORGE MEYER, in his official capacity as Secretary of the Wisconsin Department of Natural Resources,	]	
Defendant Appellee.	]	

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed on September 6, 1995 by defendant-appellee, no judge in active service has requested a vote thereon, and all the judges on the

original panel have voted to deny the petition, Accordingly,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing en banc be, and the same is hereby, DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, VALLEY SANITATION COMPANY, INC., LAND RECLAMATION COMPANY and WASTE MANAGEMENT OF WISCONSIN, INC.,

Plaintiffs,

v.

MEMORANDUM AND ORDER
94-C-603-S

GEORGE MEYER, in his official capacity as Secretary of the Wisconsin Department of Natural Resources,

Defendants.

The plaintiff National Solid Wastes Management Association and three of its members seek a declaration that several provisions of Wisconsin's solid waste management statute violate the Commerce Clause of the United States Constitution. Jurisdiction is based on 28 U.S.C. 1331. The matter is presently before the Court on cross-motions for summary judgment.

BACKGROUND

In 1989 Wisconsin adopted legislation to manage the flow of solid waste into its landfills. Its major provision forbids disposal of enumerated recyclable materials at Wisconsin landfills. Wis. Stat. § 159.07.

This prohibition does not apply, however, to solid waste generated in a municipality[12] that has an "effective recycling program," defined by Wisconsin law as a program of mandatory recycling for all entities in the municipality enforceable by local ordinance. Wis. Stat. § 159.11.

The Wisconsin Department of Natural Resources is authorized to administer the law and promulgate rules necessary to its implementation. Pursuant to its authority, the department reviews proposed recycling programs of municipalities to determine whether they meet the definition of an effective recycling program. Only for out-of-state municipalities is the department obligated to promulgate its approval by formal rule which imposes additional procedural requirements including a public hearing. Wis. Stat. § 159.11(l).

Wisconsin law also prohibits acceptance of out-of-state solid waste unless the state in which the waste was generated has an "effective siting program." Wis. Stat. § 157.07(7)(a). An effective siting program exists only if the state has sited new solid waste disposal capacity in the previous four years which exceeds the amount of solid waste generated in those years. Wis. Stat. § 159.12(3). Of the four states which border Wisconsin, Michigan has an effective siting program although both Illinois and

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[12] As used throughout this Memorandum and Order "municipality" refers to a general purpose unit of local government which is the basis for applying the law to out-of-state residents. See Wis. Stat. § 159.01(5). Although the statute makes certain distinctions concerning Wisconsin governmental units, these distinctions are not relevant for purposes of the constitutional analysis of this memorandum and order.

Minnesota have per capita disposal capacity greater than that of Wisconsin.

The interstate market for solid waste in Wisconsin and its neighboring states is limited almost exclusively to the importation of waste from out-of-state communities near the border of the importing state. Landfills and incinerators tend to serve surrounding regional wastesheds regardless of state borders. Consequently, virtually all of Wisconsin's imported solid waste comes from counties that border Wisconsin.

Municipalities in the relevant geographic area vary widely in the degree of control they assert over locally generated waste. Some municipalities collect and transport all locally generated solid waste or contract with third parties for waste disposal. Many collect or contract for the collection of residential waste requiring commercial and industrial entities to contract privately for waste disposal. Others leave all waste disposal to private contractual arrangements. Because of these varying degrees of control it is common for communities near the Wisconsin border to dispose some waste in Wisconsin and some in a bordering state.

MEMORANDUM

This case requires the court to address the ongoing tension between a state's interest to protect its environment and preserve scarce local resources and the nation's interest embodied in the Commerce Clause of the United States Constitution to preserve the free flow of commerce between the states. It is clear that Wisconsin has the right to preserve its landfill space by restricting the flow of waste into its landfills. *Philadelphia v. New Jersey*, 437 U.S. 617, 626 (1978). It may not do so, however,in a manner which discriminates against or unduly burdens interstate commerce. *Id.* Plaintiffs and

defendant each seek summary judgment on the constitutionality of the challenged statute.

Plaintiffs contend that the effective siting and rulemaking provisions of the Wisconsin statute facially discriminate against interstate commerce and that the effective recycling provision is discriminatory in a practical effect. Furthermore, plaintiffs assert that numerous less burdensome alternatives are available to Wisconsin to remove recyclables from the waste stream entering Wisconsin's landfills. Defendant argues that Wisconsin law, particularly the effective recycling provision, is neutral towards interstate commerce both facially and in practical effect and that any burden imposed upon interstate commerce is amply justified by the state's legitimate interest in preserving landfill space and protecting its environment.

Summary judgment is appropriate when, after both parties have the opportunity to submit evidence in support of their respective positions and the Court has reviewed such evidence in the light most favorable to the nonmovant, there remains no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), Federal Rules of Civil Procedure.

A fact is material only if it might affect the outcome of the suit under the governing law. Disputes over unnecessary or irrelevant facts will not preclude summary judgment. A factual issue is genuine only if the evidence is such that a reasonable factfinder could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Under Rule 56(e) it is the obligation of the nonmoving party to set forth specific facts showing that there is a genuine issue for trial.

The United States Supreme Court has established a two-tiered method for evaluating Commerce Clause challenges of state regulation. State statutes which affirmatively discriminate against interstate commerce either on their face or in practical effect are subject to heightened scrutiny. Such statutes withstand constitutional challenge only if the state can demonstrate that the statute serves a legitimate local purpose and that this purpose could not served as well by available nondiscriminatory means. *Maine v. Taylor*, 477 U.S. 131, 139 (1986). Statutes which do not discriminate but have only an incidental effect on interstate commerce are deemed valid unless "the burden imposed upon commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Because of the substantial difference in these two approaches the initial and often determinative inquiry in a commerce clause challenge is the appropriate level of scrutiny to apply. This inquiry was concisely summarized in *Philadelphia v. New Jersey*, 437 U.S. at 624:

> The critical inquiry, therefore, must be directed to determining whether [the challenged statute] is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental.

The court now examines each of the challenged provisions under these standards.

Effective Recycling Program

The effective recycling program requirement clearly does not facially discriminate against interstate commerce. It requires a municipality, regardless of its location in or out-of-state, to adopt a mandatory recycling

program before disposing of any of its solid waste in Wisconsin landfills. Plaintiffs advance no real argument that the statute facially discriminates. Accordingly, the issue concerning this provision is whether the effect of the statute is to advantage in-state economic interests relative to out-of-state market participants. *Brown-Forman Distillers Corp v. New York State Liquor Authority*, 476 U.S. 573, 579 (1986).

There are several ways that a state law can economically benefit in-state interests and economically burden interests of those in other states. First, a state statute may favor local consumers by preserving scarce resources for their use or making access to local resources by out-of-state residents relatively more difficult or costly. This type of discrimination is most common among statutes restricting the flow of solid waste. *Philadelphia v. New Jersey*, 437 U.S. 617 (striking down a statute which erected a nearly total barrier to out-of-state access to scarce New Jersey landfills.) *Oregon Waste Sys. v. Department of Envtl. Quality*, 114 S.Ct. 1345 (1994) declaring invalid a statute which facially discriminated by imposing a higher fee on out-of-state waste to be disposed in Oregon. *Government Suppliers Consolidating Servs. v. Bayh*, 975 F.2d 1267, 1279 (7th Cir. 1992) (holding backhaul restriction discriminatory in practical effect because it substantially raised the cost of disposing of out of state solid waste in Indiana while leaving unaffected the cost of the disposal of in-state waste.)

An examination of the practical effects of the Wisconsin statute does not reveal discrimination against out-of-state interests but shows instead that Wisconsin consumers are more heavily burdened by the statute than are their out-of-state neighbors. For the vast majority of Wisconsin municipalities and the citizens residing therein, the only economically reasonable choice for disposal of solid waste is in a Wisconsin landfill. Accordingly, Wisconsin municipalities not located near the state border -

are virtually compelled to bear the full burden of the mandatory recycling program in order to dispose of their solid waste. Municipalities outside Wisconsin who choose to dispose of their waste in Wisconsin bear the identical burden. Accordingly, as between these two types of municipalities, there is no discrimination in favor of Wisconsin interests.

However, out-of-state municipalities frequently have alternatives more economical than disposing their waste in Wisconsin because they may choose to dispose their waste in another state which does not impose the substantial economic burden of the mandatory recycling program. Accordingly these municipalities enjoy a method of avoiding the economic burden of the mandatory recycling program which is unavailable to centrally located Wisconsin residents and bear a relatively smaller share of the burden of Wisconsin's mandatory recycling requirement. Viewed in this way it is clear that while the effect of Wisconsin's statute may be to reduce the flow of out-of-state waste into Wisconsin, that fact does not support a finding of discrimination. It merely reflects the fact that out-of-state consumers who have more economical alternatives are likely to avoid the additional disposal costs which Wisconsin has imposed upon its own residents to reduce the flow of waste into its landfills. The overall effect of Wisconsin's method to limit the flow of solid waste into its landfills is to impose a burden upon its own residents which is equal to or greater than the burden imposed upon out-of-state consumers.

Plaintiffs' assertion that the statute practically discriminates against out-of-state interests because of financial and technical assistance offered exclusively to Wisconsin municipalities is without merit. Concerning the availability of financial assistance it is undisputed that all funds to be so applied are raised by a tax surcharge imposed exclusively upon Wisconsin residents. The combined effect is therefore completely neutral to out-

of-state interests. It is also undisputed that Wisconsin's "Counsel of Recycling" is not a source of technical assistance for Wisconsin municipalities and that the Wisconsin Department of Natural Resources provides assistance to out-of-state as well as in-state municipalities. Accordingly, there is no apparent basis to find practical discrimination based upon discriminatory assistance to Wisconsin municipalities.

A second way that statutes discriminate in favor of local economic interests is to restrict access of foreign suppliers to local markets, thereby benefitting local providers of goods and services. Such a statute was declared invalid by the Supreme Court in *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S.Ct. 1677 (1994). *Carbone* considered a flow control ordinance which required that all solid waste generated in the town of Clarkstown be processed by a local, publicly financed waste processor. The effect of this ordinance was to block access to the market for processing solid waste to out-of-state competitors who wished to provide that service. *Id.* at 1681. Similarly, the statute declared invalid in *Government Suppliers* restricted access of out-of-state waste haulers by imposing a backhaul prohibition which impacted only upon out-of-state operators. 975 F.2d at 1279. Such discriminatory statutes which have the effect of protecting local commercial entities have routinely been struck down as violative of the Commerce Clause. *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976) (precluding import of milk from-states without a reciprocal agreement with Mississippi); *New Energy Co. v. Limbach*, 486 U.S. 269 (1988) (granting sales tax credit only for ethanol produced in Ohio or in a state which grants a similar tax advantage).

The Wisconsin effective recycling program requirement does not benefit in-state commercial entities at the expense of out of state competitors. In fact, as illustrated by the plaintiffs in this case, the adverse

impact of the statute falls principally upon Wisconsin providers of services. Each of the three corporate plaintiffs in this case are owners of landfills in Wisconsin who profit by providing disposal services for waste generated out-of-state. It is clear that the effect of Wisconsin's statute will be to benefit plaintiffs' out-of-state competitors who may gain solid waste disposal business at the expense of the Wisconsin providers. The statute is therefore the antithesis of one which discriminates against interstate commerce.

Plaintiffs' reliance upon language in *New Energy Co.* and *Cottrell* relating to the impermissibility of precluding imports based upon another state's laws is misplaced in this case for at least two reasons. First, in both *New Energy Co.* and *Cottrell* the statutes had the effect of benefitting local commercial entities at the expense of their out-of-state competitors by the construction of barriers to entry. In contrast, the statute in this case benefits interstate commerce at the expense of Wisconsin consumers and commercial entities. Since the critical inquiry in all cases is whether the statute discriminates against interstate commerce, it is clear that statements concerning out-of-state law cannot be taken out of context to strike down the statute which does not so discriminate.

Second, the Wisconsin statute does not condition access to Wisconsin landfills upon the adoption of a state statute. It is directed to government entities which are direct participants in the waste disposal marketplace as decisionmakers concerning management of waste generated in their jurisdictions. For this reason, Wisconsin's insistence upon an ordinance mandating recycling prior to the acceptance of waste generated within a municipality is not analogous to the statutes considered in *New Energy* and *Cottrell* which conditioned access to local markets on state law.

Price affirmation statutes, which directly regulate the price of goods sold in-state for the benefit of local consumers, are a third type of regulation held discriminatory by the United States Supreme Court. *Healy v Beer Inst.*, 491 U.S. 324 (1989); *Brown-Forman Distillers*, 476 U.S. 573 (1986). These statutes generally involve the requirement that in-state prices of wholesale products be no higher than prices offered in other states. The effect of such a statute is to discriminate in favor of local purchasers and to affect the ability of sellers to adjust their prices in other states. Plaintiffs seek to analogize these cases to the present case asserting that Wisconsin's municipal-wide mandatory recycling program requirement regulates out-of-state commerce in the same way as did price affirmation statutes.

The Court finds this analogy inappropriate. Initially and most fundamentally the Wisconsin waste management statute does not discriminate in favor of in-state residents like the price affirmation statutes. The preference for local consumers at the expense of out-of-state consumers is the essential reason that price affirmation statutes are constitutionally invalid. *Brown-Forman*, 476 U.S. at 580.

Furthermore, this statute does not directly regulate commercial transactions as do price affirmation statutes. Municipalities which adopt a mandatory recycling program are free to contract at whatever price they please for the disposal of the treated waste. As a result, transactions with out of state waste management companies are in no way directly regulated by the statute. The burden imposed upon out of state municipalities and their residents is more analogous to the burden imposed upon milk bottlers in *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981). In *Clover Leaf Creamery* Minnesota adopted a statute banning the sale of milk in plastic containers. The effect of the statute was to impose a restriction upon out-of-state dairies who previously used

plastic jugs to sell their product. One of the potential effects of the statute was that some out-of-state producers would be compelled by production practicalities to use non-plastic containers even for the sale of milk outside Minnesota. Yet the Supreme Court determined that the statute was not practically discriminatory because of this burden imposed upon interstate commerce but was instead subject to the *Pike* balancing test. 449 U.S. at 472.

In conclusion, an analysis of the Wisconsin statute in light of the undisputed nature of the interstate market in waste which will be affected by it clearly establishes that the statute is not discriminatory on its face or in effect against interstate commerce. The statute is therefore constitutionally valid unless the incidental burden imposed on interstate commerce is "clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142.

The principal burdens upon interstate commerce imposed by the statute result from the detailed nature and municipal-wide imposition of the Wisconsin effective recycling program requirement. As a result of this requirement, out-of-state municipalities which transport only some of their waste to Wisconsin landfills will experience an increased cost even as to that waste not disposed in Wisconsin. Furthermore, municipal residents may have their choices restricted based upon the decision of the municipality not to adopt a recycling program in compliance with Wisconsin law. Several fact issues preclude balancing these burdens against the benefits to Wisconsin on summary judgment.

First, factual disputes remain concerning the extent of the burden imposed upon out-of-state communities. It is not clear how many out-of-state communities transport only part of their waste to Wisconsin. The extent of the burden of Wisconsin's

mandatory recycling program is also unclear, particularly since the amount of financial burden is affected by the current market for the sale of recyclable products generated by the program. In addition, the feasibility and availability of alternatives to a municipal-wide recycling program are vigorously contested. Such issues are inherently factual in nature and require full factual development. *See Maine v. Taylor*, 477 U.S. at 146 (feasibility of baitfish presents issue of fact).

Additional Procedural Requirements

The requirement in Wisconsin Statutes section 159.11 that only out of state municipalities are required to have their effective recycling programs approved by formal rulemaking process is facially discriminatory. Like the surety bond requirement imposed upon out-of-state truckers in *Government Suppliers*, 975 F.2d at 1285, it is an additional requirement imposed only upon out of state municipalities. Therefore, the provision must be found unconstitutional "unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism." *New Energy Co. v. Limbach*, 486 U.S. at 274. Defendant makes no attempt to justify the distinction in treatment between Wisconsin and out-of-state municipalities. His only response to plaintiffs' challenge is to assert that the additional burden upon out of state municipalities is insubstantial. A facially discriminatory statute, even one which does not impose a large burden upon out-of-state interests, cannot be found constitutional absent some justification for its existence. 975 F.2d at 1285. Accordingly, the statutory requirement that an out-of-state municipality's effective recycling program be approved by a formal rulemaking process is unconstitutional and invalid.

Plaintiffs suggest that the invalidity of the procedural requirement necessarily invalidates the entire effective waste recycling program requirement since the

challenged provisions are so closely related that they are not severable. The determination of severability is an issue of state law. *Wyoming v. Oklahoma*, 112 S.Ct. 789, 803 (1992). The general rule under Wisconsin law is set forth at 990.001(11), Wis. Stats.:

> If any provision of the statutes or of a section law is invalid, or if the application of either to any person or circumstances invalid, such invalidity shall not effect other provisions or applications which can be given affect without the invalid provision or application.

This rule is applicable unless its application would "produce a result inconsistence with the manifest intent of the legislature." *Burlington Northern, Inc. v. Superior*, 131 Wis.2d 564, 580, 388 N.W.2d 916 (1986).

There is nothing to suggest that the Wisconsin legislature did not intend to apply the general rule in this case. In fact, while the effective recycling program remained virtually the same throughout the legislative process, the additional rulemaking requirement was added by amendment without discussion. Given the relative importance placed upon the effective recycling program, it is unlikely that the Wisconsin legislature intended its continuing enforcement to be contingent upon the validity of a rulemaking procedure, which admittedly has little impact upon the application of the law. Accordingly, the Court concludes that the invalidity of the rulemaking procedure requirement does not affect the validity of the effective recycling program itself.

Effective Siting Requirement

As with the rulemaking requirement the effective siting requirement is facially discriminatory against out-of-state interests because it imposes a requirement upon

them which Wisconsin does not impose upon its own residents. Indeed, because the effect of the provision is to impose a practically complete ban on the importation of solid waste, it is similar to the provision struck down in *Philadelphia v. New Jersey*.

Defendant provides scant justification for this glaring discrimination other than a general incantation of its desire to slow the consumption of its landfill space. While the Supreme Court recognized this as a legitimate goal, it also found that the goal could not be pursued by discriminatory means such as those employed by the Wisconsin statute. 437 U.S. at 626-27. Furthermore, since most of Wisconsin's bordering states have per capita landfill capacity greater than Wisconsin's, there would appear to be no justification for a rule which bans importation of waste based upon the relative availability of landfill space. The effective siting requirement is plainly a facially discriminatory statute with virtually no justification beyond that of economic protectionism for Wisconsin residents. It is clear, however, that the effective siting requirement is also severable from the statute so that its invalidity does not affect the validity of the effective recycling program requirement.

ORDER

IT IS ORDERED that plaintiffs' motion for summary judgment is GRANTED as it concerns the rulemaking requirement found in the final sentence of section 159.11(1), Wis. Stats., and the effective siting requirement found at section 159.12(3), Wis. Stats.

IT IS FURTHER ORDERED that plaintiffs' motion for summary judgment is DENIED in all other respects.

IT IS FURTHER ORDERED that defendant's judgment is DENIED.

Entered this 15th day of December, 1994.

BY THE COURT:

/s/ John C. Shabaz
John C. Shabaz
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, VALLEY SANITATION COMPANY, INC., LAND RECLAMATION COMPANY and WASTE MANAGEMENT OF WISCONSIN, INC.,

Plaintiffs,

v.

GEORGE MEYER, in his official capacity as Secretary of the Wisconsin Department of Natural Resources,

Defendants.

MEMORANDUM AND ORDER
94-C-603-S

The plaintiff National Solid Wastes Management Association and three of its members seek a declaration that several provisions of solid waste management statute violated the Commerce Clause of the United States Constitution. On December 15, 1994, this Court entered a Memorandum and Order determining that certain portions of that law known as the "effective siting program" and "rulemaking" requirements were violative of the Commerce Clause, but that the portion of the law known as the "effective recycling program" requirement did not affirmatively discriminate against interstate commerce either on its face or in practical effect. Accordingly, the Court determined that the sole remaining

issue of fact was whether the effective recycling program requirement imposed a burden upon commerce which was "clearly excessive in relation to the putative local benefits."

That issue was tried to the Court on December 21 and 22, 1994. At the conclusion of the trial the Court made certain oral findings of fact and conclusions of law determining that the effective recycling program provision of the Wisconsin Statute did not violate the Commerce Clause and reserving the opportunity to supplement those findings of fact and conclusions of law by written memorandum. The Court now issues that supplemental memorandum clarifying and completing its remarks from the bench.

The precise issue considered by the Court at trial is set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 at 142:

> Where the statute regulates evenhandedly to effectuate legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

(Citations omitted.) This test requires the Court to make findings of fact in three basic areas: (1) The extent of the burden on interstate commerce; (2) The nature and extent of Wisconsin's interest advanced by the statute and; (3) The availability of alternatives which could achieve the

same benefits with a lesser impact on interstate commerce.

FINDINGS OF FACT

Burden on Commerce

The overall amount of interstate commerce which is impacted by the Wisconsin Statute is small. Only 4.8% of waste disposed on Wisconsin landfills is generated in another state. All of the imported waste is generated by communities located near the Wisconsin Border in Illinois, Iowa or Minnesota. Twenty-five percent of the out-of-state waste presently entering Wisconsin is unaffected by the law. As a result, the interstate component of Wisconsin's waste stream which is affected by the statute amounts to approximately only 3.6%.

Eleven out-of-state communities near the Wisconsin border have submitted effective recycling programs to the Wisconsin Department of Natural Resources, and each of these programs has been approved. The evidence presented at trial established that only about 20 communities near the Illinois or Minnesota border which presently dispose some of their community's waste in the State of Wisconsin would be adversely affected by the statute. Furthermore, most of these communities already have recycling mechanisms in place, including curbside recycling pickup of the recyclable items encompassed by the Wisconsin law. As a result the additional costs to these communities to adopt a Wisconsin program would be minimal, chiefly in the nature of administrative costs to enact an ordinance and file reports with the State of Wisconsin. The greatest number of communities presently disposing part of their waste in Wisconsin are near the southeastern border of Wisconsin in Lake and McHenry Counties, Illinois.

The principal reason that these Illinois communities have declined to submit recycling plans for Wisconsin approval appears to be the existence of the effective siting program and rulemaking requirements which this Court has previously declared unconstitutional. Specifically, the Board of Directors of The Solid Waste Agency of Lake County, Illinois transmitted to the Governor of the State of Wisconsin on April 12, 1994 a resolution of its Board of Directors which provided in part:

> WHEREAS, this agency is formed from 35 Lake County cities and villages representing 92% of Lake County's total population and the County of Lake; and
>
> WHEREAS, this agency strongly supports the concept of waste reduction and minimizing the amount of material going to landfill; and
>
> WHEREAS, at least nine member communities - have contracts or rely on the Pheasant Run Landfill in Bristol, Wisconsin for their waste disposal; and
>
> WHEREAS, the Waste Ban Law requires that waste entering Wisconsin from an out-of-state unit must originate in a state which has an "effective siting" program; and
>
> WHEREAS, the Wisconsin Department of Natural Resources (the DNR) has determined that Illinois does not have an "effective siting" program; and
>
> WHEREAS, the Wisconsin Waste Ban Law requires that an out-of-state unit must comply with an Administrative Rules procedure which, among other things, includes a review by both houses of the Wisconsin Legislature that is not required for Wisconsin communities;

. . .

NOW, THEREFORE, BE IT RESOLVED by this Board of Directors of the Solid Waste Agency of Lake County, Illinois that:

1. The Executive Director shall not submit documents certifying that member communities have an effective recycling program because of the provisions for an effective landfill siting program and the Administrative Rules process.

The letter accompanying the resolution urges the Wisconsin Legislature "to reconsider the arbitrary out-of-state provisions of this, otherwise, well intentioned law." Based upon this letter it is apparent that the adoption of a Wisconsin effective recycling program, absent the discriminatory effective siting program and rulemaking provisions, is not considered to be a substantial burden by the affected communities.

The evidence at trial also established that the net cost to a community to operate a recycling program is insubstantial. Specifically, the costs to collect and process recyclable materials is fully offset by proceeds from the sale of such materials and by a reduction in tipping fees and equipment requirements as a result of reduced volume of landfill waste.

Notwithstanding the small burden imposed by the effective recycling program requirement, certain communities are unlikely to adopt such a program for political reasons. As a result, certain private commercial waste generators who presently contract with haulers who dispose of waste in Wisconsin will be denied the option of Wisconsin disposal. Apart from two examples presented at trial, the evidence did not establish how many entities would be so affected. Neither did the evidence establish that such commercial entities would incur any additional

cost as a result of the restriction. Based upon the apparent willingness to adopt an effective recycling program after removal of the effective siting and procedural barriers, it cannot be determined that a substantial amount of interstate commerce would be impacted by the law.

Advancement of Wisconsin Interests

It was generally undisputed at trial that Wisconsin has an interest in reducing the flow of recyclable materials into its landfills and that Wisconsin realizes substantial benefits from such a reduction. These benefits include: Conserving landfill space, reducing the risk of environmental contamination and remediation costs by siting fewer new landfills, reducing the risk of environmental contamination and remediation costs from landfilling certain listed recyclable materials, conservation of raw materials and natural resources, conservation of energy and resources used to manufacture products from raw materials rather than from recyclable materials and stimulation of new markets and technologies for recyclable materials.

Available Alternatives

The evidence established that community-wide mandatory recycling is likely to result in the removal of the greatest amount of recyclable materials from the waste stream. Furthermore, the evidence presented by plaintiffs did not establish that the same result could be achieved as effectively or cheaply by available alternatives. Specifically, inspection and reporting was likely to be ineffective and imposed a substantially greater cost upon Wisconsin and its landfill consumers than the existing recycling program requirements. Furthermore, the absence of any effective means to objectively compare the effectiveness of programs make a system of reporting and inspection infeasible. Hauler certification was not

established as a viable alternative because of inherent economic pressures imposed upon a service provider who is also serving the role as regulator of its customers. Finally, the alternative of regulating different segments of the same community separately is nearly as intrusive as the present requirement and was not established as an equally effective alternative because the effectiveness of a recycling program is adversely impacted by varying standards of behavior for different segments in the same community.

CONCLUSIONS OF LAW

The burdens imposed on interstate commerce by the Wisconsin effective recycling program requirement were not shown to be substantial either in terms of the extent of interstate commerce affected or the additional costs imposed upon out-of-state consumers and commercial entities. Furthermore, the evidence established *that* any impacts will probably decline as a result of the finding of invalidity of the effective siting and rulemaking provisions.

The substantial benefits to the State of Wisconsin from the law are undisputed and these benefits cannot be achieved as effectively with any alternative which would have a reduced impact on interstate commerce.

The minimal burden on interstate commerce established at trial does not clearly outweigh the benefits to Wisconsin of extending its law to out-of-state communities.

ORDER

IT IS ORDERED that judgment be entered that the rulemaking requirement in the final sentence of Section 159.11(i), Wis. Stats., and the effective siting requirement at Section 159.12(3), Wis. Stats., violate the

Commerce Clause of the United States Constitution and are invalid, and dismissing the remaining claims in plaintiffs' complaint with prejudice.

IT IS FURTHER ORDERED that plaintiff's motions for temporary injunctive relief pending appeal are denied for those reasons stated from the bench.

Entered this 29th day of December, 1994.

BY THE COURT:

/s/John C. Shabaz
JOHN C. SHABAZ
District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, VALLEY SANITATION COMPANY, INC., LAND RECLAMATION COMPANY and WASTE MANAGEMENT OF WISCONSIN, INC.,

Plaintiffs,

v.

JUDGMENT IN A CIVIL CASE
94-C-603-S

GEORGE MEYER, in his official capacity as Secretary of the Wisconsin Department of Natural Resources,

Defendants.

This action came for consideration before the court with District Judge John C. Shabaz presiding. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that judgment be entered that the rulemaking requirement in the final sentence of Section 159.11(1), Wis. Stats., and the effective siting requirement at Section 159.12(3), Wis. Stats., violate the Commerce Clause of the United States Constitution and are invalid, and

dismissing the remaining claims in plaintiffs' complaint with prejudice.

Approved as to form this 29th day of December, 1994.

/s/ John C. Shabaz
John C. Shabaz
District Judge

/s/ Joseph W. Skupniewitz
Joseph W. Skupniewitz, Clerk

Dec 30 1994
Date

Wisconsin Statute 159.07 (1993-94) provides in relevant part:

Prohibitions on land disposal and incineration.
(1m) Batteries, major appliances and oil. No person may:

(a) Dispose of a lead acid battery or a major appliance in a solid waste disposal facility in this state, except that a person may dispose of a microwave oven in a solid waste disposal facility in this state if the capacitor has been removed and disposed of in accordance with s. 144.79 (7), if applicable.

(am) Burn a lead acid battery or a major appliance in a solid waste treatment facility in this state.

(b) Dispose of waste oil in a solid waste disposal facility or burn waste oil without energy recovery in a solid waste treatment facility in this state.

(2) Yard waste. Beginning on January 3, 1993, no person may dispose of yard waste in a solid waste disposal facility, except in a land spreading facility approved in accordance with ss. 144.43 to 144.47, or burn yard waste without energy recovery in a solid waste facility in this state.

(3) General disposal restrictions. Beginning on January 1, 1995, no person may dispose of in a solid waste disposal facility or burn without energy recovery in a solid waste treatment facility in this state any of the following:

(a) An aluminum container.

(b) Corrugated paper or other container board.

(c) Foam polystyrene packaging.

(d) A glass container.

(e) A magazine or other material printed on similar paper.

(f) A newspaper or other material printed on newsprint.

(g) Office paper.

(h) A plastic container.

(i) A steel container.

(j) A waste tire, as defined in s. 84.078 (1) (b).

(k) A container for carbonated or malt beverages that is primarily made of a combination of steel and aluminum.

(4) General incineration restrictions. Beginning on January 1, 1995, no person may convert into fuel or burn with energy recovery at a solid waste treatment facility in this state any of the following:

(a) An aluminum container.

(b) Corrugated paper or other container board.

(c) Foam polystyrene packaging.

(d) A glass container.

(f) A magazine or other material printed on similar paper.

(g) A newspaper or other material printed on newsprint.

(h) Office paper.

(i) A plastic container.

(j) A steel container.

(k) A container for carbonated or malt beverages that is primarily made of a combination of steel and aluminum.

(7) Exceptions. (a) The prohibitions in subs. (3) and (4) do not apply with respect to solid waste, except medical waste, as defined in par. (c) 1. cg., that is generated in a region that has an effective recycling program, as determined under s. 159.11, and, if the region is not in this state, the region is located in a state that has an effective siting program, as determined under s. 159.12.

(b) 1. In this paragraph:

a. "Current service area" means the area served by a solid waste treatment facility under a contract that is in effect on January 1, 1993, and has a term of at least one year.

b. "Operating solid waste treatment facility" means a solid waste treatment facility that has an operating permit or license issued under s. 144.391 or 144.44 (4) prior to May 11, 1990, except for a medical waste incinerator, as defined in par. (c) 1. cr.

2. A prohibition in sub. (3) (b), (c), (e), (f), (g), (h) or (j) or (4) (b), (c), (f), (g), (h) or (i) does not apply to a person who converts into fuel or burns at an operating solid waste treatment facility a type of material identified in one of those paragraphs that was converted into fuel or burned at the operating solid waste treatment facility during April, 1990, and either is generated in the operating solid waste treatment facility's current service area or is generated by the owner of the operating solid waste treatment facility.

(bg) The prohibitions in subs. (1m) to (4) do not apply to a person who burns solid waste at a facility that uses solid waste as a supplemental fuel if less than 30% of heat input to the facility is derived from the solid waste burned as supplemental fuel.

(c) 1. In this paragraph:

a. "Clinic" means a place, other than a residence, that is used primarily for the provision of nursing, medical, podiatric, dental, chiropractic, optometric or veterinary care and treatment.

b. "Hospital" has the meaning given in s. 50.33 (2).

c. "Infectious waste" means solid waste that contains pathogens with sufficient virulence and in sufficient quantity that exposure of a susceptible human or animal to the solid waste could cause the human or animal to contract an infectious disease.

cg. "Medical waste" means containers, packages and materials identified under sub. (3) or (4) that contain infectious waste or that are from a treatment area and are mixed with infectious waste.

cr. "Medical waste incinerator" means a solid waste treatment facility that primarily burns infectious waste and other waste that contains or may be mixed with infectious waste.

d. "Nursing home" has the meaning given in s. 50.01 (3).

e. "Treatment area" means a room or area in a hospital or clinic the primary use of which is to provide emergency care, diagnosis or radiological treatment; an

obstetrics delivery room in a hospital, other than a patient's room; or a room or area in a hospital, clinic or nursing home, identified by the department by rule, in which infectious waste is generated.

2. The prohibitions in subs. (3) and (4) do not apply with respect to any of the following:

a. The burning of medical waste in a medical waste incinerator or other incinerator approved by the department to accept and burn medical waste, except as provided in subd. 3.

b. The disposal of, in a solid waste disposal facility, a container, package or material identified under sub. (3) or (4) that contained infectious waste or that is from a treatment area and is mixed with infectious waste generated in the treatment area, if the container, package or material has been treated, pursuant to standards established under ss. 144.43 to 144.47, to render the infectious waste noninfectious.

3. A person may not burn medical waste at a medical waste incinerator unless the person complies with s. 144.382 (1), if applicable, and obtains from each generator of the medical waste a copy of the policies under sub. (8) (a) and the annual assessment under sub. (8) (b).

(d) The department may grant, to a responsible unit, an exception to a prohibition in sub. (3) or (4) for up to one year for a material identified in sub. (3) or (4) in the event of an unexpected emergency condition.

(e) The department may grant a waiver to the prohibition in sub. (2) to allow the burning of brush or other clean woody vegetative material that is no greater than 6 inches in diameter at wood burning facilities that are licensed or permitted under ch. 144 under conditions established by the department relating to the feasibility of complying with the prohibition in sub. (2).

(8) Medical waste source reduction policy. (a) A generator of medical waste that sends waste to a medical waste incinerator shall develop policies concerning reduction of medical waste, as defined in sub. (7) (c) 1. cg., including all of the following:

1. Education and training of staff.

2. Alternatives, including sterilization, to the use of disposable equipment.

3. An annual assessment of the medical waste source reduction policy.

(b) The generator shall submit the source reduction policy and the annual assessment to the operator of the medical waste incinerator.

(c) The operator of the medical waste incinerator shall retain a copy of the source reduction policy and the annual assessment and provide it to the department upon request. The department may analyze and disseminate the information that it obtains under this paragraph.

(d) The department may charge a fee for the analysis of a source reduction policy and assessment.

Wisconsin Statute 159.09 provides (1993-94) in relevant part:

Municipal and county duties and powers.

(1) Designation of responsible units. (a) Except as provided in pars. (b) to (d), each municipality is a responsible unit.

(b) A county board of supervisors may adopt a resolution designating the county a responsible unit. Except as provided in pars. (c) and (d), a county that has adopted such a resolution is the responsible unit for the entire county.

(c) Within 90 days after the county board of supervisors adopts a resolution under par. (b), the governing body of a municipality that is located in part or in whole in the county may adopt a resolution retaining the municipality's status as a responsible unit.

(d) The governing body of a responsible unit designated under par. (a), (b) or (c) may by contract under s. 66.30 designate another unit of government, including a federally recognized Indian tribe or band in this state, or a solid waste management system created under s.

59.07 (135) to be the responsible unit in lieu of the responsible unit designated under par. (a), (b) or (c). The contract shall cover all functions required under sub. (2), including provisions for financing and enforcing the recycling or other solid waste management program.

(e) The governing body of a county that adopts a resolution under par. (b) or enters into a contract under par. (d) shall submit a copy of the resolution or contract to the department and to the clerk of each municipality in the county, within 30 days after adoption of the resolution or the signing of the contract. The governing body of a municipality that adopts a resolution under par. (c) or enters into a contract under par. (d) shall submit a copy of the resolution or contract to the department and to the clerk of the county in which the municipality is located, within 30 days after adoption of the resolution or the signing of the contract.

(2) Duties. Each responsible unit shall do all of the following:

(a) Develop and implement a recycling or other program to manage the solid waste generated within its region in compliance with s. 159.07 (1m) to (4) and the priorities under s. 159.05 (12).

(b) Submit to the department by January 1, 1993, a report setting forth how the responsible unit intends to implement its program under par. (a), as it relates to the requirements of s. 159.07 (3) and (4). The report shall specify all of the following:

1. Whether the responsible unit or another person designated under sub. (3) (a) will implement each component of the program under par. (a).

2. The procedures or processes that the responsible unit intends to use to separate, collect, store, process and market solid waste or components of solid waste and to educate the public on the program.

2m. The procedures or processes that the responsible unit intends to use to manage solid waste that is not separated for recovery or recycling, consistent with the priorities under s. 159.05 (12).

3. A schedule for the implementation of the program.

(c) Provide information requested by the department on the status of the implementation of the program under par. (a).

(3) Powers. A responsible unit may do any of the following:

(a) Designate one or more other persons to implement specific components of the program under sub. (2) (a), if the designated person consents to the designation.

(b) Adopt an ordinance to enforce the program established under sub. (2) (a). The ordinance may include a schedule of forfeitures to be imposed for violations of that ordinance. The ordinance may authorize the responsible unit or person designated under par. (a) to refuse to accept solid waste at the recycling facility or site if the solid waste is a container for a nonhousehold pesticide, as defined in s. 94.68 (3) (a) 2., is contaminated or is otherwise in a condition that makes recycling infeasible. The ordinance may require a person to use a facility for the recycling of solid waste or for the recovery of resources from solid waste, as defined in s. 159.13 (1) (d), only as provided under s. 159.13.

Wisconsin Statutes 159.11 (1993-94) provides in relevant part:

Effective recycling programs.

(1) Department review. Upon request of a responsible unit or an out-of-state unit, the department shall review documentation of the responsible unit's solid waste management program created under s. 159.09 (2) (a) or the out-of-state unit's solid waste management program and determine whether the program is an effective recycling program. The department shall complete its review and make a determination within 90 days after receiving the documentation. The department

shall promulgate, by rule, its determination that an out-of-state unit's solid waste management program is an effective recycling program.

(2) Effective program criteria for responsible units. A responsible unit's solid waste management program is an effective recycling program if it includes all of the following:

(a) A public education component to inform residents of the region of the reasons to recycle, local opportunities to recycle and the prohibitions in s. 159.07 (3) and (4).

(b) A requirement that the occupants of single-family residences, buildings containing 2 or more dwelling units and commercial, retail, industrial and governmental facilities in the region either separate the materials identified in s. 159.07 (3) and (4) from postconsumer waste generated in the region or treat that postconsumer waste at a facility that will recover those materials from solid waste in as pure a form as is technically feasible, except that this paragraph does not apply to postconsumer waste burned at a facility described in s. 159.07 (7) (bg).

(c) A requirement that owners of buildings containing 5 or more dwelling units in the region do all of the following if postconsumer waste generated in those buildings is not treated at a facility that will separate the materials identified in s. 159.07 (3) and (4) from that postconsumer waste:

1. Provide adequate, separate containers for the program established under par. (b).

2. Notify tenants at the time of renting or leasing the dwelling and semiannually thereafter of the programs under this paragraph and par. (b).

3. Provide for the collection of recyclable materials separated from solid waste by the tenants and the delivery of the recyclable materials to a recycling facility.

(d) A requirement that owners of commercial, retail, industrial and governmental facilities in the region do all of the following if postconsumer waste generated in

those buildings is not treated at a facility that will separate the materials identified in s. 159.07 (3) and (4) from that postconsumer waste:

1. Provide adequate, separate containers for the program established under par. (b).

2. Regularly notify all users and occupants of the facilities of the programs under this paragraph and par. (b).

3. Provide for the collection of recyclable materials separated from solid waste by the users and occupants and the delivery of the recyclable materials to a recycling facility.

(dm) Beginning in 1997, a system of volume-based solid waste fees to generate revenue equal to the responsible unit's costs for solid waste management other than those reimbursed by the state. This criterion does not apply to any responsible unit that separates for recycling at least 25% by volume or by weight of the solid waste collected within the region by the responsible unit or by any person under contract with the responsible unit. This criterion does not apply to a responsible unit that provides solid waste to an operating solid waste treatment facility, as defined in s. 159.07 (7) (b) 1. b., under a contract that was in effect on January 1, 1993.

(e) A system for collecting from single-family residences in the region any materials separated pursuant to par. (b).

(em) A system for the processing and marketing of recyclable materials collected by the responsible unit or by municipalities located in the responsible unit.

(er) A prohibition on disposing of in a solid waste disposal facility or burning in a solid waste treatment facility any material identified under s. 159.07 (3) and (4) that is separated for recycling as part of the program.

(ew) Provisions for the management of postconsumer waste that is not separated for recycling or recovery under par. (b) consistent with the highest feasible priority under s. 159.05 (12).

(f) Other provisions established by the department by rule.

(g) Adequate enforcement of the programs established under pars. (b) to (f).

(h) The equipment or means necessary to implement pars. (a), (b), (e), (em) and (g), including contracts for service, staff, supplies and equipment from vendors.

(i) A reasonable effort, through the implementation of pars. (a) to (h), to reduce to the maximum extent feasible the amount, by weight, of each material specified in s. 159.07 (3) and (4) that is generated as solid waste within the region and disposed of in a solid waste disposal facility or converted into fuel or burned without energy recovery in a solid waste treatment facility.

(2e) Effective program criteria for out-of-state units.

(a) An out-of-state unit's solid waste management program is an effective recycling program if it is in compliance with all recycling requirements imposed by the state in which the out-of-state unit is located and has all of the components under sub. (2).

(b) The department shall promulgate rules for the determination of comparability under par. (a). The rules shall require the comparison of an out-of-state unit to a similarly situated responsible unit. The rules shall require comparability in at least the following respects:

1. The level of governmental financing for the solid waste management program.

2. Enforcement mechanisms and effort.

3. The number of materials being separated and recycled.

(2m) Variance. (a) In this subsection:

1. "Cost of disposing of processed material" means the gross cost of transferring processed material to a solid waste disposal facility and disposing of the processed material in the facility, including any disposal costs not paid through fees charged by the facility.

2. "Cost of selling processed material" means the net cost, including any storage costs, of selling processed material to a broker, dealer or manufacturing facility, plus any cost of transporting the processed material from the waste processing facility to the destination specified by the broker, dealer or manufacturing facility, less the portion of any state financial assistance received under s. 159.23 or 159.25 attributable to the processed material.

3. "Processed material" means a component of solid waste that has been collected, transported to a waste processing facility and prepared for sale to a broker, dealer or manufacturer.

(b) The department shall, at the request of a responsible unit that has been determined to have an effective recycling program under this section, grant a variance to the requirements in sub. (2) (b) and (er) for up to one year for a material identified in s. 159.07 (3) or (4) that is generated in the responsible unit's region if the department determines that the cost of selling processed material exceeds any of the following:

1. Forty dollars per ton of processed material, as annually adjusted by the department to reflect changes in price levels due to inflation since 1989.

2. The cost of disposing of processed material.

(c) The department may on its own initiative grant, to one or more responsible units that have been determined to have effective recycling programs under this section, a variance to the requirements in sub. (2) (b) and (er) for up to one year for a material identified in s. 159.07 (3) or (4) that is generated in the responsible units' regions if the department determines that the cost of selling processed material exceeds the amount under par. (b) 1. or 2.

(d) The department may grant a responsible unit with an effective recycling program a variance to a requirement in sub. (2) (b) or (er) for up to one year for a material identified in s. 159.07 (3) or (4) in the event of an unexpected emergency condition.

(2s) Notification. (a) The department shall notify the department of agriculture, trade and consumer protection whenever variances granted under sub. (2m) (b) for a plastic container, foam polystyrene packaging or any type of packaging that contains carbonated or malt beverages are in effect for responsible units representing 25% or more of the state's population.

(b) The department shall notify the department of agriculture, trade and consumer protection if, within 2 years after providing notification under par. (a) for a packaging material, the condition under par. (a) no longer exists for that packaging material.

(3) List. The department shall prepare and periodically update a list of responsible units and out-of-state units that have an effective recycling program.

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FILED
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(3)

No. 95-1079

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

GEORGE MEYER
Petitioner,
v.
NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, VALLEY SANITATION COMPANY, INC., LAND RECLAMATION COMPANY, and WASTE MANAGEMENT OF WISCONSIN, INC.
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF AMICUS CURIAE, LEAGUE OF WOMEN VOTERS, IN SUPPORT OF PETITIONER

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11 pp

QUESTIONS PRESENTED

1. Whether a non-economic, evenhanded state regulation is subject to, and prohibited by, an irrebuttable presumption of unconstitutionally under the Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3, solely because it may have an impact on out-of-state commerce.

2. Whether the "effective recycling program" provision of the Wisconsin Recycling Law discriminates against interstate commerce in practical effect, in violation of the Commerce Clause.

3. Whether the "effective recycling program" provision of the Wisconsin Recycling Law imposes a burden of interstate commerce that is clearly excessive in relation to the putative local benefits, in violation of the Commerce Clause.

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INTEREST OF THE AMICUS, LEAGUE OF WOMEN VOTERS OF WISCONSIN

The League of Women Voters of Wisconsin ("League") is a non-partisan political organization which encourages the informed and active participation of citizens in government and influences public policy through education and advocacy. The League strongly supports citizen participation in government at all levels. Consistent with its concern about the issues which face the citizens of Wisconsin, the League is concerned about

the environment and the wise use of our resources, including the management of solid waste. The League's position, at both the state and national level, has been to encourage citizens to reduce, reuse and recycle solid waste. The League has received consents from the parties to file an amicus brief to express to this Court its support of petitioner's request for a Writ of Certiorari. These consents have been filed with the Clerk.

As early as 1973, the League recognized the importance of managing solid waste, both as a means of preserving natural resources and as a response to diminished landfill capacity in the state and the difficulty and expense in siting solid waste facilities. Members of the Wisconsin League participated, with League members in Illinois, Minnesota, Michigan, and Iowa, in a study on the management of solid waste. Based upon extensive member study and consensus, the League developed policies which support reducing the generation of solid waste and promoting its reuse and recycling. Since that time, the League has been active in encouraging the state and local governments to take major responsibility in controlling solid waste.

Before the Wisconsin Recycling Law was passed, the League took a leadership role at the local level in establishing and operating recycling cooperatives. It supported bottle and can deposit laws. The League lobbied in support of the Wisconsin Recycling Law when the legislature was considering this legislation. Following the Recycling Law's passage, local Leagues were involved in implementing municipal grants to achieve the 1995 landfill bans on 14 items. Therefore,

the League has had a significant interest in, and involvement with, the subject which is before this Court in the Petition for Writ of Certiorari submitted on behalf of George Meyer.

The League strongly believes that citizens should have the right to determine the quality of the environment in which they live. As a representative of Wisconsin citizens, the League supports the Wisconsin Recycling Law as an even-handed law that should apply to all solid waste disposed of in Wisconsin, regardless of its origin. The statute provides an exception to the banning of certain recyclable materials for communities which have an effective recycling program. The League supports this law as a cost effective method for reducing the quantity of solid waste destined for Wisconsin landfills while increasing the amount of material recycled. The court of appeals' ruling harms the ability of local and state governments to protect their environment if the method chosen to do so has an impact on interstate commerce, even if that impact is incidental and not discriminatory.

The League respectfully requests that this Court grant the Petition for Writ of Certiorari because it strongly believes that the court of appeals' decision unjustifiably limits the rights of local and state governments to protect the environment in which their citizens must live.

REASONS FOR GRANTING THE WRIT

The League will not repeat the arguments of the petitioner and of the amici states; rather, the League incorporates those arguments as though stated in this brief. In addition, the League asks the Court to consider the following reasons for granting the Writ.

I. LOCAL AND STATE GOVERNMENTS SHOULD TAKE THE MAJOR RESPONSIBILITY FOR MANAGING SOLID WASTE, WITH THE FEDERAL GOVERNMENT TAKING A LEADERSHIP ROLE IN SUPPORTING LOCAL EFFORTS.

The disposal of solid waste, while primarily a state and local function, is also a national concern. 42 U.S.C. § 6901(a)(4). Congress has found that the problems of waste disposal require federal leadership "in the development, demonstration, and application of new and improved methods and processes to reduce the amount of waste and unsalvageable materials and to provide for proper and economical solid waste disposal practices." *Id.* Congress has specifically found that "alternatives to existing methods of land disposal must be developed since many of the cities in the United States will be running out of suitable solid waste disposal sites within five years unless immediate action is taken." 42 U.S.C. § 6901(b)(8). Congress has also found that "millions of tons of recoverable material which could be used are needlessly buried each year." 42 U.S.C. § 6901(c)(1). However, although the problems involving solid waste are national in scope, the collection and

disposal of solid waste is primarily the function of state, regional and local agencies. 42 U.S.C. § 6901(a)(4).

The Wisconsin Recycling Law is a response to the problems which Congress has identified. It allows local control over the local environment. The provision allowing communities with effective recycling programs to avoid the ban on certain types of waste, encourages communities and, thus, citizens, to reuse and recycle. It is a practical, even-handed response to the problems of solid waste. The League believes that a review of the court of appeals' decision invalidating the "effective recycling program" provision is necessary to allow the citizens of Wisconsin the ability to meet the goals which Congress has set.

II. THE RECYCLING PROVISION PUTS, AT MOST, A MINIMAL BURDEN ON OUT-OF-STATE COMMUNITIES.

The ability of state and local governments to effectively address the problems identified by Congress is threatened by the court of appeals' holding that an even-handed statute, which, only incidentally, has a practical impact on economic activity completely outside the state, violates the dormant commerce clause. The district court's findings of fact demonstrate the minimal effect that the requirement of an effective recycling program would have on out-of-state communities. The district court determined that the interstate component comprised only 3.6% of Wisconsin's waste stream. Petitioner's App. 43. Only 20 out-of-state communities would be adversely affected by the Wisconsin statute.

Id. Because most of these communities already have recycling mechanisms in place, the costs to adopt a procedure to meet the requirements of the Wisconsin law would be minimal. *Id.* The district court found that even the affected communities did not consider the effective recycling program requirement to be a substantial burden. Petitioner's App. 45. In fact, the adoption of the Wisconsin requirement would be cost neutral because of the savings in lower tipping fees, the need for less equipment, and the proceeds from the sale of the recycled materials. *Id.*

The evidence submitted at trial established that "community-wide mandatory recycling is likely to result in the removal of the greatest amount of recyclable materials from the waste stream." Petitioner's App. 46. The court of appeals' holding that this method impermissibly burdens interstate commerce is not only contrary to established law, as pointed out by the petitioner and the amici states, it also deprives the citizens of Wisconsin of the most effective and efficient method to deal with the problem of solid waste and protect their environment.

CONCLUSION

For the above reasons, and the reasons set forth by the petitioner and the amici states, the League respectfully requests that this Court grant the Petition for Writ of Certiorari.

Respectfully Submitted,

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(4)

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In the Supreme Court of the United States

OCTOBER TERM, 1995

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Wisconsin's recycling law violates the Commerce Clause by regulating commerce occurring wholly outside of Wisconsin.

2. Whether Wisconsin's recycling law violates the Commerce Clause by treating similar items of commerce differently based on their place of origin.

3. Whether Wisconsin's recycling law violates the Commerce Clause by imposing a burden on interstate commerce that is clearly excessive in relation to the putative local benefits.

RULE 29.6 STATEMENT

Respondent National Solid Wastes Management Association's parent corporation is Environmental Industry Associations. It has no subsidiary corporations.

Respondent Valley Sanitation Company, Inc.'s parent corporation is Superior Services, Inc. It has no subsidiary corporations.

Respondent Land Reclamation Company's parent corporation is Sanifill, Inc. It has no has no subsidiary corporations.

Respondent Waste Management of Wisconsin, Inc.'s parent corporation is WMX Technologies, Inc. It has no subsidiary corporations.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-23) is reported at 63 F.3d. 652. The district court's opinion on summary judgment (Pet. App. 26-40), its oral decision after trial (a transcript of which is included in the appendix submitted to the court of appeals (A18-A29)), and its written memorandum and order after trial (Pet. App. 41-48) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 1995. A petition for rehearing and suggestion for rehearing en banc was denied on September 20, 1995. The petition for a writ of certiorari was filed on December 18, 1995 and placed on the Court's docket on January 9, 1996. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT

The Wisconsin law at issue in this case prohibited any person or business from disposing of their trash in Wisconsin unless the community in which the person or business resided — whether located in Wisconsin or not — enacted and enforced an ordinance containing recycling regulations dictated by Wisconsin. The prohibition applied even if the trash seeking entrance to Wisconsin disposal facilities contained fewer recyclable materials than Wisconsin-approved garbage. And the ban was lifted only if the waste generator's local government — even if located outside Wisconsin — applied the Wisconsin-dictated requirements to *everyone* within its jurisdiction, including persons and businesses who did not dispose of their waste in Wisconsin.

The Seventh Circuit held that law invalid under the Commerce Clause of the U.S. Constitution for three independent reasons. *First*, by seeking to regulate trash generated and disposed of entirely outside of Wisconsin, the law unconstitutionally projected Wisconsin's regulations beyond its borders. *Second*, by treating similar products differently based solely on their place of origin, Wisconsin's law discriminated against interstate commerce. *Third*, the burdens that the Wisconsin law imposed upon interstate commerce were clearly excessive in relation to its putative local benefits, in violation of the Commerce Clause.

In reaching these conclusions, the Seventh Circuit did not announce any new rule of law; rather it closely followed this

Court's precedents. And the court's decision neither created nor perpetuated any conflict among the courts of appeals. Accordingly, there is no reason whatever why the decision below warrants this Court's review, and the certiorari petition should be denied.

A. The Wisconsin Law

The Wisconsin recycling provision banned eleven types of recyclable materials from Wisconsin disposal facilities (see Wis. Stat. § 159.07(3)-(4)) unless those materials originated in a community (whether located in Wisconsin or elsewhere) that enacted and enforced the recycling program codified at Wis. Stat. § 159.11 and its implementing regulations. See *id.* § 159.07(7) & Wis. Admin. Code Ch. NR 544.[1]

Although Wisconsin purported to bar only recyclable materials from its disposal facilities, its statute's effect was necessarily much broader. That is because even state-of-the-art recycling programs generally fail to remove all of the recyclable materials that inevitably are found in any municipal solid waste stream. A88-A89 ¶ 39.[2] Consequently, the Wisconsin recycling program requirement effectively prohibited disposal within Wisconsin of any municipal solid waste originating in a community that had not adopted a Wisconsin-approved recycling program.

Among the many required components of the Wisconsin-dictated recycling program were:

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[1] The recycling provision went into effect on January 1, 1995, while this action was pending before the Seventh Circuit. The State suspended enforcement of the provision against out-of-State waste after the Seventh Circuit issued its decision in August 1995.

[2] Citations to "A__" refer to the appendix submitted to the court of appeals.

- **Mandatory Recycling by All Sectors of Community**: The statute directed all residents and businesses to separate for recycling eleven types of materials.
- **Mandates on Building Owners**: The law required owners of large residential buildings and of all commercial establishments either (a) to treat their buildings' waste at a facility that separates out the banned recyclable materials or (b) to provide tenants with the means to recycle the required materials and to arrange for those materials to be collected separately from nonrecyclable waste and to be delivered to a recycling facility.
- **Mandates on Local Government**: The statute directed local governments (in both Wisconsin and other states) to provide recycling services for their residents, ensure the collection and marketing of recyclable materials, and provide for the processing of residentially-generated recyclables at a plant approved by the Wisconsin Department of Natural Resources.
- **Public Education**: The provision required local governments and building owners to adopt and fund continuing public education programs.
- **Enactment and Enforcement of a Local Ordinance**: The statute mandated local governments (in both Wisconsin and other states) to provide funding for recycling programs and to enact and enforce against *all* businesses and residences an ordinance codifying the Wisconsin recycling requirements. The ordinance had to: require separation of recyclables, prohibit the disposal or incineration of items that were separated for recycling, and prescribe penalties *specified by*

> *Wisconsin* for violations of the recycling requirements.

Wis. Stat. § 159.11(2); Wis. Admin. Code Ch. NR 544. See also Pet. App. 2-5.

At the time this action was tried (shortly before the statute's effective date), only twelve out-of-state communities had applied for and obtained Wisconsin certification of their recycling programs. A89 ¶ 42.[3] The parties stipulated before trial that, "[i]f the effective recycling program requirement is permitted to go into effect, and no additional out-of-state communities apply for and gain Wisconsin approval of their recycling programs, approximately 75% of the out-of-state solid waste currently disposed of in Wisconsin will be excluded from disposal in Wisconsin as of January 1, 1995." A89 ¶ 43.

B. The Extraterritorial Effect Of The Wisconsin Law

A critical feature of the Wisconsin law was that it did not limit its recycling mandate to those out-of-state residents or businesses whose waste was disposed of in Wisconsin. Rather, it mandated that *all* of a community's businesses and residents recycle the banned materials and that the community enact and enforce against *all* businesses and residents an ordinance requiring recycling of the eleven materials and imposing penalties for insufficient compliance. The court of appeals explained (Pet. App. 5):

> With respect to out-of-state communities, the statute thus obligates every waste generator in a community * * * to adhere to Wisconsin's standards, either by separating out recyclable materials or by sending waste to a materials recovery facility, even if their waste is intended for dumps in Illinois, Minnesota,

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[3] In contrast, all but three of Wisconsin's 1,095 communities had received state approval of their recycling programs. A88 ¶ 37.

> or Iowa. Everyone in the community either must separate recyclables or must use a materials recovery facility in order for anyone to receive access to Wisconsin's landfills.

Generally (although not always), local governments arrange for the collection and disposal of solid waste from private and small multi-unit homes. Local governments rarely, however, provide such services for commercial or industrial entities or for large residential buildings. Those entities contract on their own for waste collection and disposal services, and their local governments play little or no role in their choice of service. Accordingly, waste generated in a given community often will go to a number of different disposal sites, and those different disposal sites may be located in different communities or in different States. See A85-A86 ¶¶ 22-26.

Rockford, Illinois provides a good example of this phenomenon. Prior to the statute's effective date, residents of Rockford (1990 population 139,426) disposed of *all* residential solid waste and 65 percent of commercial solid waste at various disposal sites in *Illinois*. 35 percent of Rockford's commercial solid waste stream, however, was disposed of in Wisconsin. A80. In order for that 35 percent of the commercial waste stream to be readmitted to Wisconsin disposal facilities under the recycling statute, the 139,426 Rockford, Illinois residents whose waste had no connection to Wisconsin would have had to abide by the Wisconsin-dictated law, as would have all of Rockford's businesses, including the businesses that produced the 65 percent of commercial waste that had absolutely no connection with Wisconsin.[4]

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[4] Not surprisingly, Rockford did not alter its recycling program to conform to Wisconsin's law. During the period the law was in effect, therefore, municipal solid waste from Rockford was not permitted to enter Wisconsin's disposal facilities.

Rockford was not an isolated case. The district court found that if all non-Wisconsin communities whose waste generators sent some waste to Wisconsin before the law's effective date had acquiesced in Wisconsin's demand to comply with its recycling law, then *80 percent* of the out-of-state waste subjected to the Wisconsin-mandated program would be waste not disposed of in Wisconsin. Pet. App. 18. In other words, the *Wisconsin law would have governed four times as much out-of-state waste with no connection to Wisconsin as out-of-state waste with some connection to Wisconsin.*

C. The Proceedings Below

Respondents moved for summary judgment in the district court, arguing that the Wisconsin-dictated recycling program requirement, on its face, violated the Commerce Clause because it failed the strict scrutiny Commerce Clause test applicable to measures that regulate extraterritorially or discriminate against interstate commerce. See, *e.g.*, *Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Dep't of Natural Resources*, 112 S. Ct. 2019, 2024 (1992); *Healy* v. *The Beer Institute*, 491 U.S. 324, 336-337 (1989). The district court rejected those arguments and ordered a trial on whether the Wisconsin-dictated recycling program requirement violated the more lenient Commerce Clause standard set forth in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), which asks whether "the burden imposed on [interstate] commerce [by the challenged statute] is clearly excessive in relation to the putative local benefits." See Pet. App. 30-37. The court found that the burden of the Wisconsin-dictated recycling program requirement was not clearly excessive. Pet. App. 41-48.

On appeal, the Seventh Circuit reversed the district court's ruling on three independent grounds. First, the court held that the statute on its face violated the Commerce Clause principle barring one state from regulating commerce occurring wholly in other states. Pet. App. 11-19. Second,

the court concluded, by treating similar products differently based solely on their community of origin, the statute on its face discriminated against interstate commerce. *Id.* at 19-20.

These two findings, the court explained, required the State to demonstrate, under rigorous scrutiny, that it could not adequately serve its interests through nonextraterritorial and nondiscriminatory alternatives. Because the State pointed to nothing in the record that allowed it to meet that heavy burden, the statute was invalid on both of these grounds. Pet. App. 20-21.

Third, the court of appeals held that even if the district court had correctly decided to apply the lesser standard articulated in *Pike*, the statute still violated the Commerce Clause because the State easily could serve its environmental-protection interests without mandating that countless non-Wisconsin waste generators with no connection to Wisconsin conform their conduct to Wisconsin law. Pet. App. 22-23.

REASONS FOR DENYING THE PETITION

The decision below is correct and does not conflict with any decision of this Court or of another court of appeals. No member of the panel dissented, and no judge voted to rehear the case en banc. Review by this Court is not warranted.

The State's principal submission is that the court of appeals erred in concluding that the Commerce Clause bars the States from engaging in extraterritorial regulation; supposedly the court of appeals "create[d] a new independent Commerce Clause test" concerning "regulation of commerce in other states." Pet. 5, 6. But this Court's decisions in *Healy* v. *The Beer Institute*, 491 U.S. 324 (1989), and *Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. 573 (1986), expressly hold that the Commerce Clause bars extraterritorial state regulation. It is thus the State that seriously misconstrues this Court's jurisprudence.

Moreover, the court of appeals found the Wisconsin law unconstitutional on three independent grounds. The State accordingly must demonstrate that *each* of those three determinations warrants review by this Court. The State simply cannot carry that extraordinarily heavy burden.

A. The Wisconsin Law Violates The Commerce Clause's Prohibition Against Extraterritorial Regulation.

1. The Court Of Appeals Correctly Concluded That The Wisconsin Law Unconstitutionally Regulates Commerce Occurring Entirely Outside Of The State's Borders.

This Court repeatedly has made clear that the Commerce Clause precludes a State from enacting a law that has the effect of regulating markets other than its own:

- "First, the 'Commerce Clause * * * precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State;'"
- "Second, a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority * * * . The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State;"
- "Third, the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States * * * . Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State."

Healy, 491 U.S. at 336-337 (citations omitted). See also *C & A Carbone, Inc.* v. *Town of Clarkstown*, 114 S. Ct. 1677, 1683 (1994) ("States and localities may not attach restrictions to exports or imports in order to control commerce in other states"); *Quill Corp.* v. *North Dakota*, 112 S. Ct. 1904, 1912 (1992) (State may not tax out-of-state business unless out-of-state business has "substantial nexus" with the State); *Brown-Forman*, 476 U.S. at 584 (declaring statute unconstitutional without further inquiry after Court determined that statute directly regulated commerce in other states); *Baldwin* v. *G.A.F. Seelig*, 294 U.S. 511, 521-526 (1935) (declaring unconstitutional New York law that had effect of regulating commerce in other States).[5]

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[5] Dismissing the first ten pages of this Court's legal discussion in *Healy* and nearly the entirety of *Brown-Forman* as mere "lofty language" (Pet. 11) and "*dicta*" (Pet. 13), the State advances the remarkable contention that the Commerce Clause does not bar extraterritorial regulation. The court of appeals correctly rejected this contention, discussing in detail the "long line of cases that considered whether state laws violated the Commerce Clause by regulating or controlling commerce occurring wholly outside the legislating state." Pet. App. 12-13; see also *id.* at 13-18. Indeed, this Court's discussion of the extraterritorial impact of the Connecticut statute at issue in *Healy* nowhere even mentioned a claim of discrimination. See 491 U.S. at 335-340. It was only after concluding that the statute violated the Commerce Clause's prohibition against extraterritorial regulation that the Court went on to find that "[t]he Connecticut statute, moreover, violates the Commerce Clause *in a second respect*: On its face, the statute discriminates * * * ." *Id.* at 340 (emphasis added). The plaintiff in *Brown-Forman* conceded that the challenged statute was "evenhand[ed]" and did *not* discriminate against interstate commerce. See 476 U.S. at 579. Thus, there can be no doubt that the Commerce Clause's prohibition against extraterritorial regulation is independent from the antidiscrimination principle.

Healy and *Brown-Forman* well illustrate the governing principle. Both decisions reviewed state statutes requiring beer sellers in Connecticut and New York, respectively, to affirm that they were not charging Connecticut or New York consumers a higher price than the seller charged anywhere else. Although the States directed their regulation only at commerce occurring within their borders, the affirmation requirements had the practical effect of prohibiting beer sellers from raising their prices in other States once they "affirmed" those prices to Connecticut and New York. Because the statutes effectively set prices for transactions occurring wholly outside of the States' borders, this Court struck them down. See *Healy*, 491 U.S. at 337-340; *Brown-Forman*, 476 U.S. at 582-584.

The Wisconsin law is invalid for the same reason. The court of appeals stated that "[t]he practical impact of the Wisconsin statute on economic activity completely outside the State reveals its basic infirmity: It essentially controls the conduct of those engaged in commerce occurring wholly outside the State of Wisconsin and therefore directly regulates interstate commerce," in violation of the principle set forth in *Healy*. Pet. App. 11; see also *id.* at 18 ("[t]he practical

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Nor can we find any basis in precedent or reason for the State's attempt to limit *Healy* to price affirmation cases or "economic regulations." Pet. 12, 13. As the Seventh Circuit noted, the courts of appeals consistently have applied *Healy* in a variety of contexts, and not a single court has confined *Healy*'s scope to price affirmation statutes. Pet. App. 15-16. Moreover, this Court itself repeatedly has concluded that health and safety measures are the equivalent of "economic regulations" for the purpose of Commerce Clause scrutiny. See *Oregon Waste Systems, Inc.* v. *Department of Environmental Quality*, 114 S. Ct. 1345, 1354 (1994) (even if purpose of discriminatory statute is to protect environment, strict scrutiny standard applies); *Fort Gratiot*, 112 S. Ct. at 2023; *Philadelphia* v. *New Jersey*, 437 U.S. 617, 621-623 (1978).

effect of the Wisconsin legislation is to impose the requirements of Wisconsin law on numerous waste generators who neither reside, nor dispose of their waste in Wisconsin; eighty percent of the out-of-state waste subject to this legislation is destined for non-Wisconsin landfills").

After the effective date of the Wisconsin law, for example, the Rockford, Illinois commercial enterprises that previously used Wisconsin disposal facilities could not continue to use them, unless the 139,426 Rockford, *Illinois* residents and numerous *Illinois* businesses that generate their waste in *Illinois* and dispose of their waste in *Illinois* abided by *Wisconsin* law. The court of appeals correctly concluded that that result — conditioning access to a State's markets upon broad extraterritorial application of the importing State's regulatory program — was impermissible. "Wisconsin's approach to sound solid waste management, and no one else's, must govern, even when the product will never cross its borders. The Commerce Clause contemplates a very different market among the states of the union." Pet. App. 18.[6]

The court of appeals assumed, *arguendo*, that even an extraterritorial regulation might be upheld if it passed muster under the "strict scrutiny" standard applicable to state laws that discriminate against interstate commerce. Pet. App. 19-20 n.10.[7] Statutes that discriminate against interstate

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[6] In light of the statute's mandate that hundreds of thousands of non-Wisconsin residents and businesses with no connection to Wisconsin abide by Wisconsin law, we cannot understand the State's claim (Pet. 6) that the statute has only an "incidental impact" on commerce occurring outside of Wisconsin.

[7] The State is thus flatly wrong in asserting (Pet. 10) that the court of appeals adopted an "irrebuttable presumption." Other courts, however, have concluded that an impermissible extraterritorial effect renders a state law *per se* invalid. See, *e.g.*,

commerce may survive only if the State proves that the challenged statute "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy Co.* v. *Limbach*, 486 U.S. 269, 278 (1988). Accord *Oregon Waste Systems*, 114 S. Ct. at 1351 (same); *C & A Carbone*, 114 S. Ct. at 1683 (State must "demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest").[8]

The Seventh Circuit correctly concluded that "[t]he solid waste legislation itself makes clear that there is an available, less discriminatory alternative that could serve the State's purpose just as well as the requirement that the entire community follow the dictates of Wisconsin's plan." Pet. App. 21. That alternative is the use of a materials recovery facility ("MRF") — a waste treatment center that separates recyclable materials from nonrecyclable materials. *Ibid.*

Wisconsin's statute already allows businesses to use these facilities rather than separating their materials for recycling, but only if the businesses are located in a community with a Wisconsin-approved program. Wis. Stat. § 159.11(2)(c). Businesses that use such a facility, however, need not observe *any* of the other statutory requirements: separating recyclable from other waste, educating employees, etc. Because the MRF alternative is generator-based, not community based — indeed, the statute exempted generators that use an MRF

Cotto Waxo Co. v. *Williams*, 46 F.3d 790, 793 (8th Cir. 1995) (statute with practical effect of controlling conduct beyond enacting State's borders is *per se* invalid); *National Collegiate Athletic Ass'n* v. *Miller*, 10 F.3d 633, 640 (9th Cir. 1993), cert. denied, 114 S. Ct. 1543 (1994) (same).

[8] Only one state statute ever has survived this Court's application of this level of scrutiny, and that was because the State demonstrated a lack of *any* alternative to the discriminatory law. See *Maine* v. *Taylor*, 477 U.S. 131, 140 (1986).

from the otherwise-applicable community standards — the court of appeals found no reason why Wisconsin could not extend the option to generators in unapproved communities who wish to dispose of their waste in Wisconsin.

Wisconsin argued below — and presumably will argue again here — that the use of such facilities would not ensure recycling rates equal to those its program achieves. See, *e.g.*, Trial Transcript 102-104. But *the Wisconsin law itself* provided this option for generators in communities that adopted the Wisconsin program; the State simply did not demonstrate why its interests would be served less effectively by allowing generators in non-approved communities the same choice. "Accordingly," the court of appeals concluded, "Wisconsin could realize its goals of conserving landfill space and protecting the environment by mandating that all waste entering the State first be treated at a [MRF] with the capacity to effect this separation. Given the existence of such a nondiscriminatory alternative that serves adequately Wisconsin's legitimate concerns, the discriminatory legislation cannot be justified." Pet. App. 21.[9]

2. The Court Of Appeals' Decision Does Not Conflict With Any Decision Of This Court Or A Court of Appeals.

The cases the State offers in an attempt to manufacture a conflict with the decision below fail to support its view that the restraint on extraterritorial regulation does not exist. *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456 (1981), for example, did not even remotely concern the extraterritorial prong of the Commerce Clause, let alone reject the Seventh Circuit's view of *Healy* and its progeny.

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[9] As the Seventh Circuit noted, we presented numerous other non-discriminatory and non-extraterritorial alternatives to the district court and the court of appeals — alternatives whose viability the State never discredited. See Pet. App. 8 n.4.

See Pet. 6. Instead, the Commerce Clause claim in *Clover Leaf Creamery*, which upheld a Minnesota statute banning the sale of milk in plastic containers in Minnesota, was grounded solely in the anti-discrimination principle. Unlike Wisconsin, Minnesota did not require out-of-state producers to comply with Minnesota law with respect to transactions occurring outside of Minnesota. Nor (contrary to the State's claim (Pet. 6)) did the Minnesota law have the practical effect of regulating extraterritorially, *as this Court specifically emphasized*: "most dairies package their products in more than one type of container, [and so] the inconvenience of having to conform to different packaging requirements in Minnesota and the surrounding States should be slight." 449 U.S. at 472.[10]

The State's attempt to create a conflict between the Seventh Circuit's decision here and that of the Tenth Circuit in *Cotto-Waxo Co.* v. *Williams*, 46 F.3d 790 (8th Cir. 1995), is equally unavailing. See Pet. 19. The *Cotto-Waxo* court interpreted this Court's precedents precisely as the Seventh Circuit did, explaining, for example, that "a statute has [an impermissible] extraterritorial reach when it necessarily requires out-of-state commerce to be conducted according to in-state terms." 46 F.3d at 794. It was only because the

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[10] The State is also wrong when it argues for limiting *Healy* (Pet. 6) by claiming that "a state statute's control of out-of-state commerce" cannot render a law unconstitutional "because such a distinction would clear the field of any state regulation at all." That argument confuses regulation of interstate commerce with regulation of commerce wholly unrelated to the regulating State. Thus, Wisconsin obviously may regulate the content of waste disposed of within the State even though such regulations as a practical matter may require out-of-State waste generators to alter their out-of-State conduct. What Wisconsin may not do is what it tried to do here: regulate interstate commerce that has no relationship to Wisconsin.

Minnesota statute at issue in *Cotto-Waxo* applied *solely* to conduct within Minnesota and did *not* require non-Minnesota commerce to comply with Minnesota law — in sharp contrast to the Wisconsin law at issue here — that the Tenth Circuit concluded it did not transgress against the Commerce Clause's prohibition on extraterritorial regulation. *Ibid.* That conclusion fully accords with the holding below.[11]

B. The Wisconsin Law Violates The Commerce Clause's Prohibition Against Treating Similar Products Differently Based On The Product's Place Of Origin.

The recycling program violates the Commerce Clause for a second, independent reason: it discriminates against interstate commerce by conditioning entry of waste into Wisconsin's markets exclusively on the laws in force in the waste's community of origin.

1. A State May Not Condition A Product's Entry To Its Market On The Status Of The Law In The Product's State Of Origin.

The Commerce Clause prohibits States from conditioning access to their markets on the status of the law in the product's state of origin. *New Energy*, *supra*; *Great Atlantic*

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[11] The State's claim that the decision below conflicts with *United States* v. *Lopez*, 115 S. Ct. 1624 (1995), is patently absurd. In *Lopez*, the Court found a federal law prohibiting possession of a gun in a school zone beyond Congress' Commerce Clause power because the activity criminalized — simple possession of a firearm — had no arguable nexus to interstate commerce. *Id.* at 1630-1631. The Court explained that regulating activity occurring wholly within a State is the prerogative of the State in which that activity occurs. Here, the challenged aspect of the Wisconsin law violates that very precept; it is precisely because Wisconsin tried to regulate transactions occurring wholly within the jurisdiction of *other* States that Seventh Circuit struck down its enactment.

& Pacific Tea Co. v. *Cottrell*, 424 U.S. 366 (1976). Laws of this sort run afoul of the Commerce Clause for two related reasons: they have the practical effect of discriminating among products for no reason other than the products' place of origin, and they hold interstate commerce hostage to the policies of state and local governments.

New Energy illustrates the constitutional prohibition against this type of enactment. The Court there declared unconstitutional an Ohio tax credit for fuels containing ethanol produced either in Ohio or in a State that granted a similar credit to fuels containing Ohio ethanol. The Court explained that a statute that conditions favored treatment on the exporting state's laws "explicitly deprives certain products of generally available beneficial tax treatment because they are made in certain other States, and thus on its face appears to violate the cardinal requirement of nondiscrimination." 486 U.S. at 274.

As the Court explained in *Cottrell*, the problems posed by such laws extend beyond their discriminatory impact upon interstate commerce; they threaten the very existence of such commerce. For that reason, *Cottrell* struck down a Mississippi statute conditioning the sale of out-of-state milk in Mississippi on whether the exporting State agreed to the sale of Mississippi milk on a reciprocal basis:

> Mississippi may not use the threat of economic isolation as a weapon to force sister States to enter into even a desirable reciprocity agreement. * * * To allow Mississippi to insist that a sister State either [adopt a law] acceptable to Mississippi or else be absolutely foreclosed from exporting its products to Mississippi would plainly "invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause." No "parochial legislative polic[y]" could be more precisely calculated to open "the door * * * to rivalries and reprisals that were meant to be averted by subjecting

> commerce between the states to the power of the nation."

Cottrell, 424 U.S. at 379-380 (citations omitted).

The Wisconsin-dictated recycling program requirement is indistinguishable from the laws struck down in *New Energy* and *Cottrell*. Before admitting out-of-state municipal solid waste, Wisconsin did not say "tell me what is in this waste." Instead, it stated "tell me where this waste is from." If, after checking its list of approved communities, Wisconsin determined that the waste came from a community that had enacted the Wisconsin program, then that waste was admitted to Wisconsin. Waste not from such a community was excluded, *even if it was otherwise identical to admissible waste*. As the court of appeals concluded, "the Wisconsin disposal site is deprived of the waste from out-of-state not because it is more noxious than waste produced the Wisconsin way, but simply because it comes from a community whose ways are not Wisconsin's ways." Pet. App. 20.

The discriminatory character of the Wisconsin law triggers the strict scrutiny standard. See *New Energy*, 486 U.S. at 278; pages 12-13, *supra*. As we have already discussed (see pages 13-14), the court of appeals correctly concluded that the Wisconsin law fails that test.

2. The Court Of Appeals' Application Of The Anti-Discrimination Principle Does Not Conflict With Any Decision Of This Court Or A Court Of Appeals.

The State's answer to the court of appeals' discrimination discussion is similar to its response to the extraterritoriality holding. It dismisses as mere *dicta* the rationale of an entire line of decisions prohibiting exactly what Wisconsin did, and it argues — without citing to a single decision supporting its view or upholding a law like the one it defends — that a statute is immune from Commerce Clause scrutiny unless it expressly treats out-of-state products less favorably than in-

state products in an effort to advance protectionist goals. See Pet. 6, 8, 11, 17. Those arguments are as wrong as the State's claim that the Commerce Clause does not bar extraterritorial regulation.

To begin with, this Court specifically has *rejected* the claim that proof of a protectionist motive is a prerequisite to subjecting a statute to the strict scrutiny standard. See *Chemical Waste Management, Inc.* v. *Hunt*, 112 S. Ct. 2009, 2015 n.6 (1992). Nor may *New Energy* or *Cottrell* be distinguished on that ground. In *New Energy*, for example, there was no suggestion that Ohio intended to gain advantages exclusively for its citizens. To the contrary, Ohio happily would have extended the exact same beneficial tax treatment to other States' ethanol producers, as long as the other States agreed to reciprocate. It was only because, as here, other States refused to accede to the enacting State's demand, that Ohio's law disadvantaged out-of-state consumers. Nevertheless, because Ohio attempted to use trade barriers as a weapon — because it conditioned its willingness to treat other ethanol producers equally on the policy set by the home States of those other producers — this Court struck down the Ohio statute. See 486 U.S. at 274.[12]

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[12] Moreover, the Wisconsin statute *did* have the effect of favoring of in-state interests, because, as in the *New Energy* line of decisions, most exporting communities declined to submit to Wisconsin's demands. While the law was in effect, virtually all Wisconsin residents could use their waste disposal facility of choice, while 75 percent of the out-of-state solid waste that previously was disposed of in Wisconsin was denied access to its generators' disposal facilities of choice. Consequently, many out-of-state waste generators could not choose the disposal facility that provided the best price and services, the lowest transportation costs and the desired amount of protection against potential liability for environmental damage. In contrast, Wisconsin waste generators retained the ability to make such choices. And, of course, barring a large amount of out-of-state waste from Wisconsin reserved

It also is irrelevant that the effective recycling program requirement purported to apply evenhandedly to both in-State and out-of-State waste. Pet. 9. It is true that the law *theoretically* could have barred some Wisconsin waste generators from using Wisconsin disposal facilities (although that, in fact, was not the case (see *supra* note 3)). But, as this Court has stated on more than one occasion, "'a burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute.'" *Fort Gratiot*, 112 S. Ct. at 2025, quoting *Brimmer* v. *Rebman*, 138 U.S. 78, 82-83 (1891), quoting *Minnesota* v. *Barber*, 136 U.S. 313, 326 (1890).

Perhaps recognizing that the Court may actually have meant what it said in the *New Energy* line of cases, the State argues (Pet. 7-8) that, in contrast to the statutes at issue in those cases, the Wisconsin-dictated recycling program requirement does not discriminate because it serves as a perfect proxy for the content of the waste seeking entrance to the State. But the statute plainly regulates on the basis of place of origin; that fact implicates strict scrutiny. Whether regulation on that basis may be justified accordingly must be determined by applying the strict scrutiny test. Cf. *New Energy*, 486 U.S. at 278. And the fact that the State cannot satisfy that test shows that its "proxy" argument is incorrect.

Indeed, even the State is forced to admit that the Wisconsin law is not a *perfect* proxy. It claims only that Wisconsin's regime will "on average" remove more recyclables (Pet. 8), and it does not dispute that some waste generators using different programs remove more recyclables than some Wisconsin generators. But as this Court has

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Wisconsin disposal facilities for the exclusive use of Wisconsin residents. See A88 ¶ 37, A89 ¶¶ 42-43.

explained, as long as one article of commerce is excluded from a State's markets based on its place of origin rather than its own characteristics, strict scrutiny applies: "[u]nder our cases, unless one of several narrow bases of justification is shown, actual discrimination, wherever it is found, is impermissible, and the magnitude and scope of the discrimination have no bearing on the determinative question, whether discrimination has occurred." *Associated Industries of Mo.* v. *Lohman*, 114 S. Ct. 1815, 1822 (1994) (citations omitted). See also *Wyoming* v. *Oklahoma*, 112 S. Ct. 789, 801 (1992) (Oklahoma statute requiring Oklahoma coal-fired electric plants to use at least ten percent Oklahoma coal unconstitutionally discriminates against interstate commerce despite state's claim that statute does not impose an "overall burden" on interstate commerce: "[t]he volume of commerce affected measures only the *extent* of the discrimination; it is of no relevance to the determination whether a state has discriminated against interstate commerce") (emphasis in original).

C. The Wisconsin Law Is Unconstitutional Because It Imposes A Burden On Interstate Commerce That Is Clearly Excessive In Relation To The Requirement's Putative Local Benefits.

There is a final reason why the decision below does not warrant this Court's review: after conducting a fact-intensive review of the trial record, the Seventh Circuit held that even if the Wisconsin statute had not fallen to the prohibitions against extraterritorial regulation and discriminatory enactments, it still would be invalid under *Pike*.

A state law is invalid under *Pike* if "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits. * * * [T]he extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." 397 U.S. at 142.

Reviewing the evidence presented to the district court, the Seventh Circuit concluded that although Wisconsin has a substantial interest in conserving disposal capacity *in Wisconsin*, it "has no legitimate interest in requiring that out-of-state generators conform to the Wisconsin plan when those entities are not going to transport the waste to Wisconsin." Pet. App. 22-23. "On the other hand," the court found, "the burden on the out-of-state generator is substantial." *Id.* at 23. Because the Wisconsin statute itself codified an alternative that would have alleviated the substantial burden imposed on these out-of-state generators — the MRF (see pages 13-14, *supra*) — the court concluded that the Wisconsin law's "very significant burden on interstate commerce * * * far outweighs the permissible benefits that Wisconsin, as a member of the federal union, has a right to expect." Pet. App. at 23.

The State does not even attempt to show that this fact-based determination is worthy of this Court's attention. But this ground of decision provides an independent basis for the court of appeals' judgment of unconstitutionality. Even if the Court were inclined to review the court of appeals' other determinations, therefore, the *Pike* holding provides an alternate basis for the court of appeals' judgment. The petition accordingly should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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October Term, 1995

GEORGE MEYER,

Petitioner,

v.

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, VALLEY SANITATION COMPANY, INC., LAND RECLAMATION COMPANY, and WASTE MANAGEMENT OF WISCONSIN, INC.

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

BRIEF OF AMICUS CURIAE, STATES OF NORTH DAKOTA, CALIFORNIA, DELAWARE, FLORIDA, IDAHO, INDIANA, KENTUCKY, MAINE, MICHIGAN, MINNESOTA, MISSISSIPPI, NEW HAMPSHIRE, NEW MEXICO, NEW YORK, OHIO, TEXAS, AND WEST VIRGINIA DIVISION OF ENVIRONMENTAL PROTECTION, AND IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI STATES AND SUMMARY OF REASONS TO GRANT WRIT

This Court has long recognized the power of states to provide the traditional local government services – police and fire protection, roads, lighting, traffic control, water, sewage, waste control, and other matters affecting local health and safety. The amici curiae states, through their respective Attorneys General, join in this brief because the decision of the Seventh Circuit Court of Appeals threatens their ability to exercise these local police powers.

The Court of Appeals held that Wisconsin's recycling statute violates the dormant Commerce Clause because it has a "practical impact" on interstate commerce. Virtually every state activity has some impact on interstate commerce. The Court of Appeals' decision invites dormant Commerce Clause challenges to any state law which has a "practical impact" on interstate commerce, no matter how small that impact. This conflicts with the decisions of this Court that recognize states may affect interstate commerce in the exercise of their police powers.

This Court has consistently recognized that the dormant Commerce Clause, like the Supremacy Clause, gives increased deference to states' evenhanded regulatory powers that involve protection of health and safety, natural resources, the environment, and other areas states traditionally regulate. Challenges to such regulations must overcome a strong presumption of validity. Even where commerce is affected, this Court recognizes that states retain broad authority under their police powers to develop effective policies to address particular local concerns.

Both Congress and the states have defined resource recovery, which includes recycling, as a cornerstone of environmental protection. Congress expressly recognizes that waste control and resource recovery should continue to be primarily the function of State, regional, and local agencies. Further, the states have traditionally occupied the resource recovery arena. This Court has recognized resource recovery regulation as an area of legitimate state interest.

The Court of Appeals in this case second-guessed the judgment of the Wisconsin legislature without giving proper deference and consideration to these principles. An evenhanded regulation which arguably affects commerce, such as Wisconsin's recycling statute, should not be summarily invalidated because it may have some "practical impact" on interstate commerce.

Further, this Court must resolve the conflict between circuits concerning whether an evenhanded regulation which has an extraterritorial effect violates the dormant Commerce Clause per se. *Compare* the Court of Appeals' decision in this case with *Cotto Waxo Co. v. Williams*, 46 F.3d 790 (8th Cir. 1995).

The amici states respectfully request that this Court grant Wisconsin's Petition for Writ of Certiorari because (1) the Court of Appeals' decision conflicts with applicable decisions of this Court and (2) this Court must settle the conflict between circuits concerning whether an evenhanded regulation which has an extraterritorial effect violates the dormant Commerce Clause per se.

REASONS FOR GRANTING THE WRIT

1. THE COURT OF APPEALS' DECISION CONFLICTS WITH BOTH RECENT AND LONG-STANDING DECISIONS OF THIS COURT PROTECTING THE RIGHT OF STATES TO REGULATE LOCAL CONCERNS, SUCH AS RECYCLING, WHEN SUCH REGULATIONS ARE NON-ECONOMIC AND PROTECT LOCAL HEALTH AND SAFETY, NATURAL RESOURCES, OR THE ENVIRONMENT.

"Virtually every state activity, like virtually every activity of a private individual, arguably 'affects' interstate commerce." *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 582 (1985) (O'Connor, J., dissenting). Yet in this case, the Court of Appeals determined the Wisconsin recycling statute violates the dormant Commerce Clause because it has a "practical impact" on "economic activity completely outside the State." PETITIONER'S APPENDIX, p. 11. Under the Court of Appeals' analysis, any statute or regulation which has a practical impact, no matter how small, on economic activity completely outside the state will constitute a per se violation of the dormant Commerce Clause. PETITIONER'S APPENDIX, pp. 11-23. This conflicts with a long line of decisions of this Court recognizing that "in the exercise of a necessary power" states "may affect" interstate commerce. *See, e.g., St. Louis-S.F. Ry. v. Public S.C.*, 261 U.S. 369, 371 (1923).

a. STATES MAY LOSE THE ABILITY TO IMPLEMENT EFFECTIVE HEALTH AND SAFETY REGULATIONS.

This Court has long distinguished between economic protectionism, on the one hand, and health and safety regulation, on the other. *Fort Gratiot Landfill v. Michigan Dep't of Natural Resources*, 504 U.S. 353, 365-66 (1992); *Sporhase v. Nebraska, ex rel. Douglas*, 458 U.S. 941, 956 (1982); *Philadelphia v. New Jersey*, 437 U.S. 617, 623-24 (1978); *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 533 (1949). From its earliest decisions, this Court recognized the regulatory authority of a state is greatest in matters affecting the "health" of its citizens. *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. 245, 250 (1829) (holding Delaware could safeguard the health of its citizens by draining a marshy creek which was an interstate waterway even though such action blocked federally licensed boating); *Gibbons v. Ogden*, 22 U.S. 1, 205 (1824). *Compare U.S. v. Lopez*, 115 S. Ct. 1624, 1647 (1995) (Thomas, J., concurring) (long recognized validity of "state inspection, quarantine, and health laws" even when they have "substantial effects" on interstate commerce).

In addition, this Court gives great deference to states' regulatory powers when they involve matters of local concern such as regulation of the environment and natural resources. *Kassel v. Consolidated Freightways*, 450 U.S. 662, 670 (1981). *See Douglas v. Seacoast Prod., Inc.*, 431 U.S. 265, 287 (1977) (Rehnquist, J., concurring); *Baldwin v. Seelig*, 294 U.S. 511, 525 (1935). This Court has upheld a variety of regulations designed to conserve and maintain the collective natural resources of the state. *See Sporhase*, 458 U.S. at 956 (upholding three of four groundwater

protection regulations); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981) (resource recovery); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976) (resource recovery); *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960) (local air quality); *Wyoming v. Colorado*, 353 U.S. 953 (1957) (apportionment of surface water); *Geer v. Connecticut*, 161 U.S. 519 (1896) (wildlife protection); *Smith v. Maryland*, 59 U.S. 71 (1855) (fisheries protection).

The district court in this case found Wisconsin's recycling statute protected health and safety by reducing the risk of environmental contamination. PETITIONER'S APPENDIX, p. 46. Legislative measures enacted to promote health and safety are accorded particular deference. *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 443 (1978); *H.P. Hood*, 336 U.S. at 533. Challenges to state public safety regulations must overcome a "strong presumption of their validity." *Raymond Motor*, 434 U.S. at 444. Courts will not second-guess legislative judgments about the importance of health and safety in comparison to the burdens on interstate commerce. *Kassel*, 450 U.S. at 670. States are not required to convince courts of the correctness of their legislative judgments. *Clover Leaf*, 449 U.S. at 464. Rather, those challenging the legislative judgment must convince the court that the government decisionmaker could not reasonably conceive the legislative facts on which the judgment is based are true. *Id.*; *Vance v. Bradley*, 440 U.S. 93, 111 (1979). *See also Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 425 (1952); *Henderson Co. v. Thompson*, 300 U.S. 258, 264-265 (1937). In this case, the Court of Appeals second-guessed the judgment of the

Wisconsin legislature and the district court without giving proper deference and consideration to these principles.

States retain broad authority under their general police powers to regulate matters of legitimate local concern even though interstate commerce is affected. *Maine v. Taylor*, 477 U.S. 131, 138 (1986). *See Clover Leaf*, 449 U.S. at 463-469, 473. The power of states to shelter their people from menaces to health or safety, even when those dangers emanate from interstate commerce, is deeply rooted in both history and law. *H.P. Hood*, 336 U.S. at 533. Although this Court consistently has rebuffed states' attempts to advance their own commercial interests by curtailing the movement of articles of commerce, this Court generally has supported states' rights to impose even burdensome regulations in the interest of local health and safety. *Id.* at 533-35.

Congress recognizes that states bear the primary responsibility for waste control and resource recovery:

> The Congress finds with respect to solid waste –
>
> . . . .
>
> (4) that while the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies, the problems of waste disposal as set forth above have become a matter national in scope and in concern and necessitate Federal action through financial and technical assistance and leadership in the development, demonstration, and application of new and improved methods and processes to reduce the amount of waste and unsalvageable materials and to provide for

> proper and economical solid waste disposal practices.

42 U.S.C. § 6901(a)(4).

Further, Congress determined that improper management and disposal of solid and hazardous waste is a threat to human health and the environment. 42 U.S.C. § 6901(b)(2). Congress identified a specific need to recycle used oil to conserve resources and protect public health. 42 U.S.C. § 6901a. Congress also established the objectives of assisting the states to develop resource recovery programs and to minimize generation and disposal of hazardous waste. 42 U.S.C. § 6901(a)(1), (6), (7), & (11).

The Environmental Protection Agency defines resource recovery as a key element in achieving environmental goals by reducing or eliminating sources of contamination. 57 Fed. Reg. 37,194 at 37,195 (1992) (codified at 40 CFR Part 148 et seq.). At certain levels the toxic constituents of certain recyclables become regulated as hazardous waste under the Resource Conservation and Recovery Act (RCRA) through individual hazardous waste programs as delegated to the states. 42 U.S.C. §§ 6901-6992K. Even below these levels, many states regulate accumulations of these constituents in the environment through disposal or incineration because such accumulations have adverse impacts.[1]

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[1] Data for table prepared by North Dakota State Health Department.

RECYCLABLE	POTENTIAL TOXICITY	FEDERAL REGULATORY AUTHORITY
Lead-acid batteries	lead and sulfuric acid	40 CFR Part 261
Other batteries	cadmium and mercury	40 CFR Part 261
Waste oil	lead, cadmium, chrome, trace amounts of solvents	40 CFR Part 261
Paint and solvents	toxicity and ignitability	40 CFR Part 261
Electronic appliances	lead, solder and mercury	40 CFR Part 261
Refrigeration-type appliances	chlorofluorocarbons (CFCs)	Sec. 608 Federal Clean Air Act
Fluorescent lighting tubes	mercury and lead	40 CFR Part 261
Plastics	lead, cadmium, incinerator ash	40 CFR Part 261
Tire stockpiles	rats, snakes, mosquito breeding, and toxic emissions from inherently unstoppable fires	
Antifreeze	ethylene glycol	

This Court has recognized states' abilities to consider individual constituents of waste. In *Fort Gratiot*, 504 U.S. at 366, the Court noted that its holding would have been different if imported waste raised health or other concerns not presented by the receiving state's waste. States have attempted to define whether imported waste raises health or other concerns not presented by their own waste. North Dakota, for example, requires waste generators who store or dispose of such waste in North Dakota to effectively characterize their waste. N.D.C.C. § 23-29-07.8. This characterization requirement is substantially less than the characterization requirements for in-state waste. N.D. Admin. Code §§ 33-20-01.1-03, 04, 06, 07, 08, 09, 11; 33-20-03.1-02(6)(b) & (g) and (7)(b); 33-20-04.1-03(1)(a) and (1)(h). The decision of the Court of Appeals, if allowed to stand, will prevent statutes like North Dakota's waste characterization law from having any impact on interstate commerce. PETITIONER'S APPENDIX, pp. 11-23. Yet, if the waste is not characterized, there is no way of determining whether it raises health or other concerns not presented by the receiving state's waste. This is but one example of the Catch-22 position in which states are placed under the Court of Appeals' decision.

In its brief before the Court of Appeals, the National Solid Waste Management Association (NSWMA) indicated Wisconsin could accomplish its purposes through the alternative method of requiring out-of-state waste generators to follow the Wisconsin recycling program. NSWMA said the state could demand production of relevant records and inspect out-of-state generators to verify

compliance. Under NSWMA's alternative regulation, Wisconsin could even recover additional costs for its inspection and monitoring program. NSWMA's Appellant Brief before the Seventh Circuit Court of Appeals, p. 34. Yet, even NSWMA's alternative method cannot be implemented without having some "practical impact" on interstate commerce.

To protect surface water, ground water, air quality, fish and wildlife, soil resources, nonrenewable resources, and the health and safety of their citizens, states must be able to exercise their police powers effectively to provide traditional local government services. The Court of Appeal's holding prevents states from doing so whenever a state statute has a "practical impact" on "economic activity completely outside the State." PETITIONER'S APPENDIX, p. 11. As such, it is in direct conflict with this Court's previous decisions, the will of Congress, the Environmental Protection Agency, and state laws implementing effective solid waste management programs.

b. CONTRARY TO THE DECISIONS OF THIS COURT, THE COURT OF APPEALS CONCLUDED THAT ANY "PRACTICAL IMPACT" ON "ECONOMIC ACTIVITY COMPLETELY OUTSIDE THE STATE" VIOLATES THE DORMANT COMMERCE CLAUSE PER SE.

Previous decisions of this Court that invalidated state laws because of their extraterritorial effect have all involved discriminatory economic regulations of integrated interstate markets that either directly regulated commerce beyond that state's boundaries or had the practical effect of regulating commerce beyond that

state's boundaries. *See Healy v. Beer Institute*, 491 U.S. 324 (1989) (regulation of out-of-state wholesale liquor prices in interstate commerce); *Edgar v. MITE Corp.*, 457 U.S. 624 (1982) (regulation of out-of-state securities transactions in interstate commerce); *Baldwin*, 294 U.S. at 522-24 (regulation of out-of-state milk prices in interstate commerce); *Public Utilities Comm'n of Rhode Island v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927) (regulation of out-of-state wholesale electricity prices in interstate commerce); *Missouri ex rel. Barrett v. Kansas Nat. Gas Co.*, 265 U.S. 298 (1924) (regulation of out-of-state wholesale natural gas prices).

However, "[n]ot every exercise of state power with some impact on interstate commerce is invalid." *Edgar*, 457 U.S. at 640 (*citing Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), and *Huron Portland Cement*, 362 U.S. at 443). This Court consistently protects the rights of states to enact and enforce evenhanded non-economic regulations that effectuate a legitimate local public interest and only incidentally affect interstate commerce unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Id.*; *Clover Leaf*, 449 U.S. at 470-75. This Court strikes down Congressional acts which invade these areas of legitimate local control if the law does not involve matters which substantially affect interstate commerce, or if it requires states to regulate matters of national concern which Congress could regulate directly. *Lopez*, 115 S. Ct. at 1626-30 (involving a criminal law that did not substantially affect interstate commerce); *New York v. U.S.*, 505 U.S. 144, 178 (1992) (holding the Constitution does not give Congress authority to require states to regulate).

Further, even when a state law discriminates against interstate commerce, the law is still valid if it serves a legitimate local purpose that cannot be served as well by available nondiscriminatory means. *Maine*, 477 U.S. at 140; *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951). *See also Oregon Waste Systems v. Department of Env. Quality*, 114 S. Ct. 1345, 1351 (1994); *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 348 (1992); *Fort Gratiot*, 504 U.S. at 366.

In this case, the Court of Appeals jumped directly to analysis of whether the Wisconsin law had practical impact on economic activity completely outside the state under the *Healy* line of cases without first determining whether the Wisconsin law is an evenhanded non-economic law which only incidentally affects interstate commerce. PETITIONER'S APPENDIX, p. 11. This turns dormant Commerce Clause law on its head. The first step in analyzing any law subject to judicial scrutiny under the dormant Commerce Clause is to determine whether it regulates "evenhandedly" with only "incidental" effects on interstate commerce, or whether it "discriminates" against interstate commerce. *Oregon Waste*, 114 S. Ct. at 1350. *Philadelphia* makes clear that the balancing test from *Pike* is to be used when non-discriminatory legislative objectives "are credibly advanced and there is no patent discrimination against interstate trade." 437 U.S. at 624. It is the Court of Appeals' upside-down analysis that causes the amici states to ask this Court to grant the Petition for Writ of Certiorari. Contrary to the applicable decisions of this Court, the Court of Appeals' analysis leads to the

conclusion that any "practical impact" on economic activity outside the state violates the dormant Commerce Clause per se.

The district court, on the other hand, began its analysis where *Oregon Waste* requires it to – by determining whether the statute is evenhanded or discriminatory. PETITIONER'S APPENDIX, p. 30. The district court determined that most of the Wisconsin recycling law is not discriminatory, *id.* at 30-37, and invalidated those portions of the law that were discriminatory (because they treated out-of-state municipalities different than in-state municipalities), *id.* at 37-39. The district court then proceeded to make many specific findings of fact in relation to the portion of Wisconsin's recycling law that is evenhanded. *Id.* at 43-47.

The amici states' critical concern is the Court of Appeals' failure to distinguish between discriminatory economic regulations that result in economic protectionism, on the one hand, and evenhanded non-economic regulations that protect health, safety, the environment, and other legitimate local public interests, on the other. *See, e.g., Fort Gratiot*, 504 U.S. at 365-66. The amici states respectfully ask this Court to grant the Petition because the Court of Appeals' decision conflicts with the decisions of this Court by making any impact on interstate commerce a per se violation of the dormant Commerce Clause.

c. THE COURT OF APPEALS' DECISION NULLIFIES STATE REGULATION BASED ON THE PRECEPTS OF FEDERALISM.

Federalism allows states to develop effective regulations that address legitimate local public interests. *Seacoast Products*, 431 U.S. at 266. This is particularly true when the local need involves an area of historical state regulation without federal preemption. *Id.*

This Court has recognized consistently that the dormant Commerce Clause, like the Supremacy Clause, gives increased deference to state regulatory powers involving protection of health and safety, natural resources, the environment, and other areas traditionally regulated by the states. *See, e.g., CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 86, 87-94 (1987). When Congress regulates in an area that is historically within the states' police powers, the party arguing preemption must overcome the strong presumption that Congress does not intend to displace state law. *Pacific Gas & Elec. v. State Energy Resources Comm'n*, 461 U.S. 190, 206 (1983); *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). No less deference should be paid to police powers historically exercised by the states when Congress has not acted.

Health and safety regulations carry a strong presumption of validity when challenged in court. *Brotherhood of Locomotive Firemen and Enginemen v. Chicago, R. I. & P. R. Co.*, 393 U.S. 129, 138-39, 142 (1968); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 524 (1959). If there are alternative ways of solving a problem, this Court does

not determine which of those ways is best suited to achieving a valid state objective. *Brotherhood*, 393 U.S. at 138-139; *Bibb*, 359 U.S. at 524. Policy decisions are for state legislatures to make absent federal entry into the field. *Brotherhood*, 393 U.S. at 138-139; *Bibb*, 359 U.S. at 524.

This is particularly true when the regulation must be innovative to address distinct local concerns. *Reeves, Inc. v. Stake*, 447 U.S. 429, 437 (1980). States must be allowed to structure relations between their citizens and fashion effective and creative programs to solve local problems. *Id.* Because of a healthy regard for federalism and good government, this Court has been reluctant to step into areas historically subject to state police powers. *Id.*

> "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311, 52 S. Ct. 371, 386, 76 L.Ed. 747 (1932) (Brandeis, J., dissenting).

Reeves, 447 U.S. at 437.

This Court recognizes that the Framers of the Constitution never intended to cut the states off from legislating on subjects relating to the health, life, and safety of their citizens, even though the legislation might indirectly affect commerce. *Huron Portland Cement*, 362 U.S. at 442-44. Legislation may affect commerce and persons

engaged in commerce without constituting a regulation of commerce within the meaning of the Constitution. *Id.* (*citing Collins v. American Buslines, Inc.*, 350 U.S. 528 (1956) (state worker's compensation act applies to an employee killed in interstate commerce where federal government had not occupied field); *Boston & M.R.R. v. Armburg*, 285 U.S. 234 (1932) (state worker's compensation act applicable to employees engaged exclusively in intrastate commerce); *Simpson v. Shepard*, 230 U.S. 352 (1913) (enforcement of intrastate rates on interstate commerce); *Louisville & Nashville R. Co. v. Kentucky*, 183 U.S. 503 (1902) (conviction of railroad company for charging unlawful rates); *Austin v. Tennessee*, 179 U.S. 343 (1900) (criminal conviction for sale of tobacco); *Sherlock v. Alling*, 93 U.S. 99 (1876) (liability in tort absent Congressional action)).

This Court recently expressed its strong concern to preserve the "distinction between what is truly national and what is truly local." *Lopez*, 115 S. Ct. at 1634. These distinctions preserve the balance between federal, state, and local authority intended under our "federalist" system. *Younger v. Harris*, 401 U.S. 37, 44-45 (1971); *Lopez*, 115 S. Ct. at 1634-42 (Kennedy, J., concurring). The importance of clarifying federalism's role in states' resolution of local problems is an additional reason to grant Wisconsin's Petition for Writ of Certiorari.

However, the Court of Appeals' analysis erroneously equates a "practical impact" on "economic activity completely outside the state" with a per se violation of the dormant Commerce Clause under the *Healy* line of cases. The Court of Appeals' decision invites dormant Commerce Clause challenges to any state law which has a

"practical impact," no matter how small, on interstate commerce. This threatens the validity of any state law that impacts interstate commerce – from state vehicle emission standards enacted under the Clean Air Act, to inspection laws which protect state resources from pests and disease; from recycling laws such as bottle bills which further federally enacted goals such as those set forth in RCRA and the federal Pollution Prevention Act of 1990, to waste characterization statutes that follow the principles outlined in *Fort Gratiot*.

Waste control and resource recovery are among those services that are "local" by their very nature – as are police and fire protection, roads, lighting, traffic control, water, and sewage. *Compare Garcia*, 469 U.S. at 578 (Powell, J., dissenting). "Not only are these activities remote from any normal concept of interstate commerce, they are also activities that epitomize the concerns of local, democratic self-government." *Id.* at 575. It is functions such as these for which local governments were created and which local governments perform best. *Id.* at 576. State and local officials must be intimately familiar with these services and sensitive to their quality as well as cost. *Id.* at 578. If state and local governments are not allowed to develop innovative and cost effective waste control and resource recovery laws, waste control and resource recovery simply will not happen. *See* district court's findings of fact, PETITIONER'S APPENDIX, p. 46 (determining that "inspection and reporting" were "likely to be ineffective" and impose "a substantially greater cost upon Wisconsin and its landfill consumers than the existing recycling program requirements").

The amici states respectfully request that this Court grant Wisconsin's Petition for Writ of Certiorari because the Court of Appeals' decision conflicts with the applicable decisions of this Court discussed above and raises important questions of federal law that can only be resolved by this Court.

2. THIS COURT MUST SETTLE THE CONFLICT BETWEEN CIRCUITS CONCERNING WHETHER AN EVENHANDED REGULATION WHICH HAS AN EXTRATERRITORIAL EFFECT VIOLATES THE DORMANT COMMERCE CLAUSE PER SE.

In *Cotto Waxo Co. v. Williams*, 46 F.3d 790 (8th Cir. 1995), the Eighth Circuit Court of Appeals determined that an evenhanded non-economic regulation which had only an incidental effect on interstate commerce did not violate the dormant Commerce Clause. In this case, the district court determined that most of Wisconsin's recycling statute was an evenhanded regulation that only incidentally affected interstate commerce, striking those portions of the law that were discriminatory. PETITIONER'S APPENDIX, pp. 30-44. Without overturning the legal and factual conclusions of the district court, the Court of Appeals determined that Wisconsin's recycling statute violated the dormant Commerce Clause per se because it has a "practical impact" on interstate commerce. *Id.* at 11-23.

The amici states respectfully request that this Court resolve this conflict between circuits concerning whether

an evenhanded regulation which has an extraterritorial effect violates the dormant Commerce Clause per se.

CONCLUSION

For the reasons stated above, the amici states respectfully request that this Court grant Wisconsin's Petition for Writ of Certiorari.

Respectfully submitted,

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(6)

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No. 95-1079

In The

Supreme Court of the United States

October Term, 1995

GEORGE MEYER,

Petitioner,

v.

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, VALLEY SANITATION COMPANY, INC., LAND RECLAMATION COMPANY, and WASTE MANAGEMENT OF WISCONSIN, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY

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A. THE WISCONSIN RECYCLING LAW SURVIVES BOTH STRICT SCRUTINY AND THE BALANCING TEST BECAUSE THERE IS NO NONDISCRIMINATORY, LESS RESTRICTIVE, EQUALLY EFFECTIVE ALTERNATIVE AND THE LAW IMPOSES ONLY MINIMAL BURDENS ON OUT-OF-STATE COMMERCE. 3

B. THE WISCONSIN RECYCLING LAW SURVIVES BOTH THE NEW EXTRATERRITORIAL IMPACT AND TRADITIONAL STRICT SCRUTINY TESTS BECAUSE IT IS AN EVENHANDED, NON-ECONOMIC, NONPROTECTIONIST LAW THAT HAS ONLY INCIDENTAL IMPACT ON OUT-OF-STATE COMMERCE RESULTING FROM THE DIFFERENT NATURE OF WASTE THAT IS SUBJECT TO THE LAW. 6

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PETITIONER'S REPLY

I. THE PETITION SHOULD BE GRANTED IN ORDER TO RESOLVE THE CONFLICT THE SEVENTH CIRCUIT DECISION CREATES WITH THIS COURT'S COMMERCE CLAUSE JURISPRUDENCE, TO RETURN COMMERCE CLAUSE ANALYSIS TO ITS PROPER CONCERN WITH ECONOMIC PROTECTIONISM AMONG STATES, AND TO RESTORE STATE AUTHORITY TO REGULATE EVENHANDEDLY.

Respondents build from a base of false statements of fact and misstatements of law a house of cards that falls

under the weight of the actual facts before the trial court and this Court's Commerce Clause jurisprudence. What remains unobscured is a decision that invalidates a noneconomic, nonprotectionist, evenhanded state regulation that was proven to have only an incidental, minimally burdensome impact on out-of-state commerce and that was proven to be the most effective and least restrictive means of achieving legitimate health and safety goals. Because the decision upends this Court's Commerce Clause analysis and threatens states' authority to regulate within their traditional purview, this petition should be granted to clarify the Commerce Clause test and its application to evenhanded state regulation.

The United States Court of Appeals for the Seventh Circuit erroneously invalidated Wisconsin's Recycling Law as an extraterritorial regulation, erroneously posited the existence of a nondiscriminatory alternative to revoke the law under the strict scrutiny test, erroneously concluded that the law regulates based on origin rather than content of waste, and erroneously speculated that the law imposes excessive burdens relative to its benefits. It is because the first error is so interwoven in the remaining three errors that the respondents may have misunderstood the petition to seek review only of the decision's first finding. The petition makes clear that all four errors must be corrected by this Court, to restore to states the authority to regulate evenhandedly, authority that the decision has taken away.

A. THE WISCONSIN RECYCLING LAW SURVIVES BOTH STRICT SCRUTINY AND THE BALANCING TEST BECAUSE THERE IS NO NONDISCRIMINATORY, LESS RESTRICTIVE, EQUALLY EFFECTIVE ALTERNATIVE AND THE LAW IMPOSES ONLY MINIMAL BURDENS ON OUT-OF-STATE COMMERCE.

The decision and respondents' brief are striking for the facts they overlook, notably that the district court found no nondiscriminatory alternative to exist to the Recycling Law and only a minimal burden to flow from the law. The Seventh Circuit never properly reviewed those findings of ultimate fact or the evidence on which they were based.[1]

Not all the waste in Rockford may be headed to Wisconsin, but the trial testimony established that a law aimed only at that waste would not be as effective at keeping out recyclable materials. The evidence showed that a law aimed only at the Rockford waste that goes to Wisconsin would not take out as many recyclable materials as the effective recycling program, and would be more intrusive and burdensome for all involved.[2] Pet. App. 47.

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[1]Contrary to the customary practice of this Court in Commerce Clause cases, the court of appeals analyzes the Recycling Law in a factual vacuum. This petition should be granted to prevent courts from considering Commerce Clause challenges based on speculation rather than actual factfinding.

[2]Respondents' assertion that the Law affects "hundreds of thousands of non-Wisconsin residents and businesses with no connection to Wisconsin" (Resp. 12 n.6) is not supported by any evidence in the record. See Pet. App. 45. And of the generators

(continued...)

Respondents did present several alternatives directed only at the waste to be disposed of in Wisconsin, but each and every one was discredited at trial (contrary to their assertion, Resp. 14 n.9), which may explain the absence of factual citations concerning alternatives in their brief.

One additional alternative proposed by respondents and found by the Seventh Circuit within the law itself is a materials recovery facility (MRF) that accepts unseparated waste. This alternative too was discredited at trial. It may be true that a MRF that accepts unseparated waste obviates the need for the waste generator to be subject to an effective recycling program. However, the evidence established that this kind of MRF is actually a nonexistent alternative. Trial Transcript 181, 189, 196. There is no such MRF in Wisconsin. Elsewhere, this kind of MRF has not yet succeeded because it cannot eliminate contamination of the recycled materials at the end of the processing and therefore cannot sell its product. Thus, this kind of MRF is not now a nondiscriminatory alternative to the effective recycling program.

Just as the evidence turned up no nondiscriminatory alternative to the law, so it showed almost no burden from the law. Waste generators, respondent haulers, and communities would benefit economically from the establishment of an effective recycling program. Pet. App. 43-46. There was by contrast

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[2](...continued)
who are affected, there was no evidence of any generator removing more recyclable materials from its waste than are removed in communities with an effective recycling program, respondents' speculation notwithstanding (Resp. 20). If a generator were to come forward and show that its waste contains no recyclable materials, then its waste would be allowed in Wisconsin landfills. Waste that contains no recyclable materials is not subject to the effective recycling program requirements.

no evidence that it would cost generators more either to comply with the program if it was adopted, or to use other disposal facilities if not. Not only was there no evidence that the law precluded out-of-state waste generators from choosing the cheapest disposal service (Resp. 19 n.12), but the evidence that was adduced showed just the opposite. Pet. App. 43-46.[3]

Respondents accurately note that their customers account for most of the out-of-state municipal waste that enters Wisconsin, but miss the significance of the fact that twelve out-of-state communities established effective recycling programs nevertheless--the law's requirements cannot have been too burdensome for those communities despite the relatively insubstantial amount of waste involved. The district court drew a similar conclusion from communications from the communities for which respondents speak, in which those communities made clear to Wisconsin that all that stood between them and an effective recycling program were the two siting and rulemaking provisions the district court knocked down and the State never sought to resurrect. Pet. App. 44-45.

Respondents offer no citations to the appellate decision to support their assertion of a fact-intensive review of the trial record reversing the district court's finding of no excessive burden (Resp. 21), because there was no such review. The citations respondents do make

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[3]Respondents complain that under the Recycling Law out-of-state waste generators were disadvantaged relative to Wisconsin residents because Wisconsin residents could use the landfill of choice while out-of-state waste generators could not use Wisconsin landfills (Resp. 19 n.12). But any such disadvantage occurred because almost all Wisconsin communities adopted an effective recycling program, while some out-of-state communities did not. Had they done so, their residents would have had the same choices as Wisconsin residents.

show that the Seventh Circuit simply fell back on its finding of extraterritorial regulation. Neither respondents nor the Seventh Circuit identify the substantial burden imposed by the Recycling Law, because the record failed to reveal such a substantial burden.

B. THE WISCONSIN RECYCLING LAW SURVIVES BOTH THE NEW EXTRATERRITORIAL IMPACT AND TRADITIONAL STRICT SCRUTINY TESTS BECAUSE IT IS AN EVENHANDED, NON-ECONOMIC, NONPROTECTIONIST LAW THAT HAS ONLY INCIDENTAL IMPACT ON OUT-OF-STATE COMMERCE RESULTING FROM THE DIFFERENT NATURE OF WASTE THAT IS SUBJECT TO THE LAW.

It is only by ignoring the evidence that the square peg of Wisconsin's Recycling Law can be forced into the round hole of economic and protectionist law invalidated by the cases on which respondents and the Seventh Circuit rely. The Commerce Clause bars extraterritorial regulation by economic, protectionist legislation like that in Healy v. The Beer Institute, 491 U.S. 324 (1989), and Brown-Forman Distillers v. N. Y. State, 476 U.S. 573 (1986). The statements respondents quote to support a much broader prohibition (Resp. 9) are artificially segregated from the economic, protectionist regulations to which they apply, regulations not at all like the Recycling Law. The Recycling Law is not aimed at controlling commerce, cf. C & A Carbone, Inc. v. Town of Clarkstown, 114 S. Ct. 1677 (1994), is not a price statute or market regulation that gives local consumers or producers a competitive advantage, cf. Brown-Forman, 476 U.S. 573, Baldwin v. G.A.F. Seelig, 294 U.S. 511 (1935), and New

Energy Co. of Indiana v. Limbach, 486 U.S. 269 (1988), and is not a tax case.[4]

All the cases cited by the Seventh Circuit to support its creation of a new, irrebuttable, extraterritorial impact test and its application of the traditional strict scrutiny test[5] involve economic legislation and factual records showing concern with the relative positions of in-state and out-of-state markets. None of those cases supports the application of the new test or the strict scrutiny test to a noneconomic, nonprotectionist, evenhanded regulation like the effective recycling program provision.[6] The diversity of interests reflected by the seventeen state amici, including both waste exporters and waste importers, is a testament to what distinguishes this case from those relied on by respondents and the Seventh Circuit--the effective recycling provision is a pure health and safety regulation of the content of waste, unsullied by any animus toward out-of-state waste and with only a minimal and incidental impact on out-of-state commerce in waste.

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[4]Taxation cases are inapposite inasmuch as the special values applicable to Commerce Clause challenges to state taxes are additional analytical elements not relevant here. Norfolk Southern Corp. v. Oberly, 822 F.2d 388, 399 (3rd Cir. 1987).

[5]Respondents' assertion that the court of appeals "assumed" that an extraterritorial regulation could still be saved if it passed the strict scrutiny test (Resp. 12 n.7) is not supported by the decision.

[6]Indeed, in direct conflict with the decision in this case, the new extraterritorial regulation test was found not to invalidate an evenhanded regulation in Cotto Waxo Co. v. Williams, 46 F.3d 790 (8th Cir. 1995), even though the Minnesota law in that case required Cotto Waxo to set up a whole new sales network in order to bypass Minnesota, thereby significantly affecting commerce that had no relation with Minnesota.

That the provision may have a "practical impact" on out-of-state waste transactions is not disputed, but the Seventh Circuit never searches the record for the nature of that impact.[7] The court assumes the impact must be economically adverse (Pet. App. 18), yet the record discloses otherwise, as noted above. Generators, haulers, and communities will experience little or no increase in cost, and more likely a cost savings. Pet. App. 43-46. Yet, regardless of the incidental and economically benign nature of the impact on out-of-state commerce, the Seventh Circuit forces Wisconsin to accept an inferior alternative and inferior product. Such a result is counter to this Court's precedent.

The Seventh Circuit similarly never searches the record to discern the reason for the impact the Recycling Law may have on out-of-state commerce. That reason is that waste from communities with effective recycling programs is different in nature from waste from communities without such programs. Respondents proffered no evidence that waste from the two kinds of communities is or can be identical in content. Rather, the evidence that was presented established that waste from the latter is more noxious. Pet. App. 46-47.

It is because waste is not like other articles of commerce--its generation is not subject to one producer's control and it cannot be subjected to separate production lines like containers of milk or labels on bottles--that to change its content most effectively, meaning in this case to maximize the absence of recyclable materials, requires a law that affects the generation of waste regardless where

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[7]Notably, respondents assert that a little inconvenience does not constitute a practical extraterritorial effect (Resp. 15). As in Minnesota v. Clover Leaf Creamery, 449 U.S. 456 (1981), so the little inconvenience found by the district court in this case should remove the Recycling Law from the reach of the court of appeals' extraterritorial impact test.

the waste is destined. Where such product differentiation is possible, state regulation of the product has been allowed. Minnesota v. Clover Leaf Creamery, 449 U.S. 456 (1981). That no published case has yet upheld a law like the Recycling Law (Resp. 18) indicates not that the law is unconstitutional, but that never before has a court in a published case addressed an evenhanded, noneconomic, nonprotectionist law regulating an unfungible product.

CONCLUSION

Respondents' assertion that the Commerce Clause is not about economic protectionism (Resp. 18) is proof positive both of the degree to which the Seventh Circuit has strayed from the intent and reach of the Commerce Clause, and of the necessity for this Court to grant this petition in order to preserve states' authority to regulate consistent with the Commerce Clause. As the economy becomes more national, respondents' arguments and the Seventh Circuit's analysis will leave little leeway for evenhanded state regulation. This Court should grant this petition to clarify the distinction between discriminatory and evenhanded state regulation and to reclaim this Court's established Commerce Clause analysis.

Respectfully submitted this 8th day of March, 1996.

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